THE COPYRIGHT ACT, 1911

ANNOTATED.

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E. J. MACGILLIVRAY.

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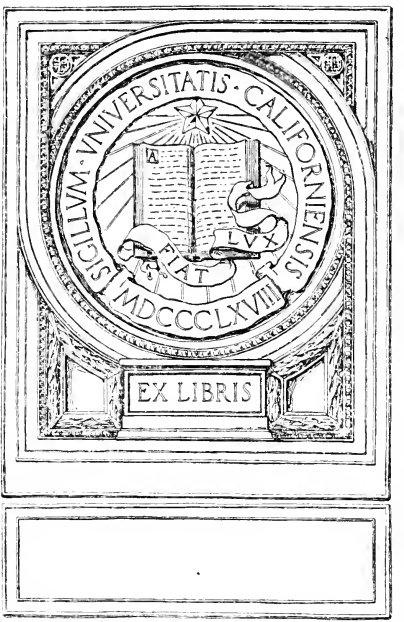
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THE

COPYRIGHT ACT, 1911,

ANNOTATED.

WITH APPENDIX

CONTAINING

THE REVISED CONVENTION OF BERNE.

BY

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LONDON:

STEVENS AND SONS, LIMITED,

119 & 120, CHANCERY LANE,

Law Publishers.

1912.

INTRODUCTION.

THE Copyright Act, 1911, consolidates and amends the whole law of copyright. When it is supplemented by legislation in the self-governing dominions, and by Orders in Council and Regulations of the Board of Trade, there will be a complete code of copyright law for the whole of the British dominions.

Such a code has long been desired by all those interested in the legal rights of authors, artists and publishers. So long ago as 1878 a consolidation of the law was recommended by a Royal Commission, which carefully considered the whole subject, and reported that they found the existing law "wholly destitute of any sort of arrangement, incomplete, often obscure, and, even when intelligible upon long study, so ill-expressed that no one who did not give such study to it could expect to understand it."

The great obstacle in the way of consolidation and amendment has been the difficulty in coming to a satisfactory settlement with the self-governing dominions. Canada, in particular, has long demanded complete autonomy in the matter of copyright legislation, and it became increasingly obvious that if a consolidating Copyright Act was to be passed, the self-governing dominions would insist on having complete liberty to cut themselves adrift from Imperial legislation if they so desired. Authors and publishers in this country were not unnaturally extremely nervous of the possible consequences of Colonial autonomy. Each self-governing dominion might, by a manufacturing clause, exclude English and American authors from the enjoyment of copyright except upon condition that the book should be reprinted from type set within the dominion. This alone would be sufficiently serious, but there was the further possibility that if Canada adopted a manufacturing clause as against the United States, the latter might retaliate against Great Britain by excluding British subjects from copyright in the United States upon any condition. Unless the publishers in this country could have reasonable assurance that these things would not follow upon the passing of a consolidating Act they were content to abide by

the *status quo*, which, on the whole, afforded a fairly satisfactory protection throughout the British dominions.

It was thus that matters drifted until 1908, when the Berne Convention was revised at Berlin. Great strides had been made in copyright legislation on the Continent since the last revision of the Convention at Paris in 1896, and matters were now ripe for an international agreement very much in advance of the original Berne Convention. The British delegates accordingly signed a treaty which demanded in many respects a larger protection for authors and artists than was accorded by English law. It became obvious that if the revised Convention was to be ratified by Great Britain, substantial alterations would have to be made in our domestic legislation. The position was carefully considered by a Departmental Committee of the Board of Trade under the presidency of Lord Gorell, and the Committee in substance approved of the terms of the Revised Convention, and recommended that it should be ratified and that legislation should be passed to give effect to it in this country.

In order to solve the long-standing difficulty with the self-governing dominions, the opportunity was taken of calling together a subsidiary Copyright Conference of the Colonial delegates who came to attend the Imperial Conference in the summer of 1910. This Conference passed resolutions giving general approval of the Revised Convention, and recommending an Imperial Copyright Act which should apply to the whole of the British Empire, but at the same time make the adoption of the Act optional in the self-governing dominions. The self-governing dominions were to have an absolutely free hand, each in its own dominion, but provision was to be made that if any self-governing dominion did not afford satisfactory protection to the works of British subjects resident elsewhere, then the residents in that dominion might be excluded from the enjoyment of Imperial copyright.

It was upon this basis that the Bill was drafted and the Act passed.

The principal changes which the Act will effect upon the existing law may be briefly summarised—

1. Extension of the term of copyright to life and fifty years (subject to certain exceptions).

2. Provision that the last twenty-five years of the term of copyright shall be unassignable by the author during his lifetime.

3. Provision that during the last twenty-five years any person may reproduce a work without consent on payment of a ten per cent. royalty.

4. Exclusive right of dramatising and translating secured to the author.

5. Dramatic works entitled to protection include pieces in dumb show, ballets and cinematograph productions, and the copyright is infringed by the making or exhibiting of unauthorised cinematograph films.

6. Subject to the right in certain circumstances of making records upon payment of a royalty, the composer of a musical composition gets the sole right of adapting his composition for use upon mechanical instruments.

7. Subject to limitations in respect of remedies, and to the right of making paintings, drawings, engravings or photographs of any architectural work, architectural works are included among artistic works entitled to protection.

8. Taking of short passages for insertion in school books is permitted.

9. Subject to conditions and limitations, an exclusive right of oral delivery is conferred in respect of non-dramatic works, such as lectures, speeches and sermons.

10. Summary remedies, hitherto confined to infringements of musical works, are made applicable to all classes of works, and to infringements of performing rights, but the remedies are not so complete as in the case of musical works.

11. The National Library of Wales is, subject to limitations, included as one of the libraries entitled to free copies of books from the publishers.

12. Copyright subsists from the time a work is created, the condition of protection being, in the case of an unpublished work, that the author is a British subject or resident, and in the case of a published work, that it was first published within the dominions to which the Act applies.

13. Common law right in unpublished works is abrogated, but in the case of a literary, dramatic, or musical work, or an engraving, copyright subsists until publication notwithstanding the expiration of the period of life and fifty years, and if publication is posthumous, then for fifty years after publication.

14. No copyright vests in the proprietor of a collective work unless the author is employed under a contract of service or apprenticeship, or there is an assignment in writing; and when the copyright vests in the proprietor of a periodical by reason of a contract of service or apprenticeship, the author may restrain separate publication.

15. The passing of the copyright by reason of the work having been executed on commission is confined to the cases of engravings, photographs and portraits.

16. The self-governing dominions are given a free hand in copyright matters. Each dominion may adopt or reject the Imperial Act as it pleases. Similarly, each dominion may adhere to the Revised Convention or to the original Berne Convention, or it may decline to adhere to either, and so place itself in the position of a non-union country.

Taking it as a whole, the Copyright Act, 1911, is a valuable measure in the interests of literature and art. It may be said that the Government has made too many concessions, both to the socialistic demands of the members of the Labour Party, who believe that there should be no copyright, and to the demands of the makers of mechanical instruments, who appealed to the Government to save a great industry from possible bankruptcy. It was obvious, however, after the first few days in Committee, that it had become a question of passing the Bill with these concessions or abandoning it altogether. The Government were right in choosing the former course. They have carried an Act from which authors as a class will get much better protection for their work than they have hitherto enjoyed. The Act will undoubtedly simplify the law, and although there may be an increase of copyright litigation for the next few years, this will not continue after a few doubtful points have been cleared up and laymen begin to understand the salient features of the new law. The self-governing colonies have at last got their desire in the matter of copyright autonomy, and there is good reason to believe that it will not be exercised so as in any way to prejudice the market for English books either in Canada or the United States. That all this has been accomplished where so many before them have failed is due very largely to the courageous statesmanship of Mr. Sydney Buxton and Sir John Simon, to both of whom all authors must for ever owe a deep debt of gratitude for the splendid work which they have done.

E. J. MACGILLIVRAY.

3, Temple Gardens, E.C.
January, 1912.

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COPYRIGHT ACT, 1911.

(1 & 2 GEO. 5, CH. 46.)

An Act to amend and consolidate the Law relating to Copyright. [16th December 1911.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

PART I.

IMPERIAL COPYRIGHT.

Rights.

1.—(1) Subject to the provisions of this Act, copyright (*a*) shall subsist throughout the parts of His Majesty's dominions to which this Act extends (*b*) for the term herein-after mentioned (*c*) in every original literary dramatic musical and artistic work (*d*), if— § 1 (1). Copyright.

(*a*) Sect. 1 (2).
(*b*) Sects. 25 (1), 26 (1), 27, 28, 35 (1) ("Self-governing dominion").
(*c*) Sects. 3, 16 (1), 17, 19 (1), 21.
(*d*) Sect. 35 (1) ("Literary work," "Dramatic work," "Artistic work").

§ 1 (1).

(a) in the case of a published (*e*) work, the work was first published within such parts of His Majesty's dominions as aforesaid (*f*); and

(b) in the case of an unpublished work (*g*), the author (*h*) was at the date of the making of the work a British subject or resident within such parts of His Majesty's dominions as aforesaid (*i*);

but in no other works, except so far as the protection conferred by this Act is extended by Orders in Council thereunder relating to self-governing dominions to which this Act does not extend (*k*) and to foreign countries (*l*).

"His Majesty's dominions to which this Act extends."

The Act will be in force [with the exception of provisions expressly restricted to the United Kingdom (*m*) and subject to the right of a British possession to pass supplemental legislation relating to (i) procedure and remedies (*n*); (ii) works of authors resident in such possession; (iii) works first published in such possession (*o*)] in—

(1) The United Kingdom (*n*);

(2) All British possessions other than self-governing dominions (*p*);

(3) Self-governing Dominions, that is to say, Canada, Australia, New Zealand, South Africa and

(*e*) Sects. 1 (3), 31, 35 (2).
(*f*) Sects. 23, 25 (2), 35 (3).
(*g*) Sects. 1 (3), 31, 35 (2).
(*h*) Sects. 16 (2), 19 (1), 21.
(*i*) Sect. 25 (2), 26 (3), 35 (4) (5).
(*k*) Sect. 26 (3).
(*l*) Sect. 29.
(*m*) Sect. 25. These are sects. 11—13 (Summary Remedies) and sect. 15 (Delivery of Books to Libraries).
(*n*) Sect. 25.
(*o*) Sect. 27.
(*p*) Sects. 25, 26, 35 (1) ("Self-governing dominion").

Newfoundland, if the self-governing dominion has by its legislature declared the Act to be in force therein (and such declaration has not been repealed (*p*));

(4) Protectorates, including Cyprus, to which the Act may be extended by Order in Council (*q*).

Existing law.—The Act of 1842 relating to books extends throughout the British dominions, and the rights and remedies conferred by the Act are not affected by any colonial legislation (*r*), except in so far as any British possession may have passed an Act or Ordinance relating to works first published in such possession (*s*). The Act of 1862 relating to artistic works extends to the United Kingdom only; and paintings, drawings and photographs are accordingly unprotected throughout the British possessions, except in so far as they are protected by colonial legislation (*t*). The Acts relating to engravings and probably that relating to sculpture are also confined in their operation to the United Kingdom. Pictures which are first published in a book are, however, protected as part of the book, and therefore it has always been possible to obtain protection for drawings, paintings and engravings throughout the British dominions by first publishing them in the form of a book (*u*).

"Every original literary, dramatic, musical and artistic work."

An attempt was made in Grand Committee of the House of Commons to strike out the word "original" on the ground that derivative works such as translations or engravings would be excluded. It is clear that the adjective is properly inserted here. "Original" as applied to a work merely indicates that it must contain some substantial feature which is not copied from a previously existing work. If a work is derivative and there is some novel feature which distinguishes it from the work from which it is derived, that novel feature constitutes the originality and receives protection, and the novel feature alone is protected in so far as the derivative work is concerned.

The reproduction of spoken words in the form of a

(*p*) Sects. 25, 26, 35 (1) ("Self-governing dominion").
(*q*) Sect. 28.
(*r*) *Smiles* v. *Belford* (1876), 1 Ont. A. R. 436; *Macmillan* v. *Shamsul, &c.* (1895), Ind. L. R. 19 Bomb. 557.
(*s*) Int. Cop. Act, 1886, s. 8 (4).
(*t*) *Graves* v. *Gorrie*, [1903] A. C. 496.
(*u*) *Bogue* v. *Houlston* (1852), 5 De G. & S. 267; *Maple* v. *Junior Army and Navy Stores* (1882), 21 Ch. D. 369; *Davis* v. *Benjamin*, [1906] 2 Ch. 491.

§ 1 (1). written report, and the recording of musical sounds upon a perforated roll or gramophone record constitute in each case the making of an original work, the originality consisting in the new form in which the words or music are produced (*x*).

All works protected in whatever form they are produced.

An important feature of the new Act is that every literary, dramatic, musical, and artistic work is protected without making any specified physical form of production a condition precedent to protection and, indeed, without demanding that the work shall be clothed in any physical form at all. Thus, a literary work will no longer require to be embodied in the form of a "book" before receiving statutory protection, and it may be protected even although it exists only in the form of spoken words which the author has not committed to paper.

Summary of different classes of works specifically protected.

The following are the classes of works which are specifically referred to as receiving protection, but the Act is so framed that the list is illustrative and not necessarily exhaustive. The classes of works indicated in italics receive protection for the first time:—

Literary works—
- Maps.
- Charts.
- Plans.
- Tables.
- *Records, perforated rolls, &c.*
- Lectures—
  - Addresses.
  - Speeches.
  - Sermons.

Dramatic works—
- Pieces for recitation.
- *Choreographic works.*
- *Entertainments in dumb show.*
- *Cinematograph productions.*
- *Records, perforated rolls, &c.*

Musical works—
- *Records, perforated rolls, &c.*

Artistic works—
- Paintings.

(*x*) *Walter* v. *Lane*, [1900] A. C. 539.

Drawings.
Works of sculpture—
    Casts.
    Models.
Works of artistic craftsmanship.
Architectural works of art.
Engravings—
    Etchings.
    Lithographs.
    Wood-cuts.
    Prints.
Photographs.

Condition precedent to the protection of a published work.

In the case of a published work the sole condition precedent to protection will be first publication, which includes simultaneous publication (that is, publication within fourteen days of publication elsewhere (*y*)), and such first publication must be made either—

(1) Within His Majesty's dominions to which the Act extends;
(2) Within a self-governing dominion in respect of which the Secretary of State has given a certificate that such dominion gives to British subjects generally rights substantially identical with those conferred by the Act (*z*);
(3) Within a self-governing dominion in respect of which an Order in Council has been made extending the benefit of the Act thereto (*a*);
(4) Within a foreign country in respect of which an Order in Council has been made extending the benefit of the Act thereto (*b*).

The Crown has power by Order in Council to exclude from protection, under the above provisions, the works of subjects or citizens of any foreign country which does not give adequate protection to the works of British authors (*c*).

The right of foreign authors to demand protection by first publication is based on Article 6 of the Berlin Con-

(*y*) Sect. 35 (3).
(*z*) Sect. 25 (2).
(*a*) Sect. 26 (3).
(*b*) Sect. 29 (1) (a).
(*c*) Sect. 23.

§ 1 (1). vention, which provides that authors of non-union countries shall be protected throughout the union if they first publish in a union country (*d*).

If the Crown ever exercises the power conferred upon it by sect. 23, it will be violating the treaty obligation contained in Article 6 of the Berlin Convention and in Article 3 of the Berne Convention.

Existing law.—Statutory protection in the case of books depends upon first publication within the British dominions or within a foreign country in respect of which an Order in Council has been made (*e*). First publication includes simultaneous publication (*f*), but there is no latitude of fourteen days. Publication must be on the same day in order to be deemed simultaneous with publication elsewhere (*g*).

In the case of serial works each part must be first published in order to secure copyright in that part (*h*).

In the case of published books first publication is the only condition precedent to protection (*i*).

Under the Fine Arts Act, 1862, statutory protection in respect of paintings, drawings and photographs does not depend on publication (*k*). Copyright vests on making, and is conditional upon the author being a British subject or resident within the dominions of the Crown. The copyright will cease if the work is first published outside the British dominions, unless protection is then given by international provisions (*l*). Under the Berne Convention and Act of Paris foreign artists are entitled to copyright under the Fine Arts Act, 1862, (1) in an unpublished work if made by a subject or citizen of a foreign country which is a party to the

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(*d*) Berlin, Art. VI.

(*e*) *Routledge* v. *Low* (1868), L. R. 3 H. L. 100; *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815; *Boosey* v. *Purday* (1849), 4 Ex. 145; *Lover* v. *Davidson* (1856), 1 C. B. (N. S.) 182; *Chappell* v. *Purday* (1845), 14 M. & W. 303; *Cocks* v. *Purday* (1848, 5 C. B. 860; Int. Cop. Act, 1886, s. 8 (1); Int. Cop. Act, 1844, s. 19.

(*f*) *Cocks* v. *Purday* (1848), 5 C. B. 860; *Buxton* v. *James* (1851), 5 De G. & S. 80.

(*g*) *Boosey* v. *Purday* (1849), 4 Ex. 145, 158.

(*h*) *Reid* v. *Maxwell* (1886), 2 T. L. R. 790.

(*i*) The law was so stated in the opinion given by the law officers in this country when, in 1891, the United States asked for an assurance that American subjects received satisfactory protection in England. Doubts had previously existed (1) as to whether printing within the dominions was necessary (*Jefferys* v. *Boosey* (1854), 4 H. L. C. 815, 983; *Clementi* v. *Walker* (1824), 2 B. & C. 861, 867); (2) as to whether British nationality or residence on the part of the author was necessary (*Jefferys* v. *Boosey* (1854), 4 H. L. C. 815; *Routledge* v. *Low* (1868), L. R. 3 H. L. 100; *Low* v. *Ward* (1868), L. R. 6 Eq. 415).

(*k*) Fine Arts Act, 1862, s. 1; *Bowden Bros.* v. *Amalgamated Pictorials*, [1911] 1 Ch. 386.

(*l*) Int. Cop. Act, 1844, s. 19.

copyright union; (2) in a published work if first published in a foreign country which is a party to the copyright union (*m*).

Condition precedent to the protection of an unpublished work.

An unpublished work is entitled to protection if at the date of making the work the author was—

(1) A British subject (not being resident within a self-governing dominion which has neither adopted the Act nor given adequate protection to the works of British subjects generally) (*n*);

(2) Resident or domiciled within His Majesty's dominions to which the Act extends;

(3) Resident or domiciled within a self-governing dominion in respect of which the Secretary of State has given a certificate (*o*);

(4) Resident or domiciled within a self-governing dominion in respect of which an Order in Council has been made extending the benefit of the Act thereto (*p*);

(5) A subject or citizen of a foreign country in respect of which an Order in Council has been made extending the benefit of the Act thereto (*q*);

(6) Resident or domiciled within a foreign country in respect of which an Order in Council has been made extending the benefit of the Act thereto (*q*).

In respect of unpublished works it is of great importance to note (a) that the Act consolidates the whole law relating to copyright, and that the old common law right in unpublished works is expressly taken away from the author; (b) that a statutory definition of publication has been adopted which brings this country into line with the Continental acceptance of the meaning of publication.

One remarkable result of the abrogation of the common law right is that foreigners who do not become entitled to statutory protection under this section will obtain no protection in the nature of copyright for their unpub-

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(*m* Berne, Arts. II., III.; Act of Paris, Arts. II., III.; Int. Cop. Act, 1886, Preamble, s. 2; Order in Council, 1887, s. 1; Order in Council, 1898, s. 1; *Surpy* v. *Holland*, [1908] 2 Ch. 198; *Hanfstaengl* v. *American Tobacco Co.*, [1895] 1 Q. B. 347.

(*n*) Sect. 26 (3).

(*o*) Sect. 25 (2).

(*p*) Sect. 26 (3).

(*q*) Sect. 29.

§ 1 (1).

lished manuscripts, however secret and confidential they may be.

Provided the author possesses the necessary qualification as above indicated, all unpublished works receive statutory protection from the time they are created, that is to say, from the date of uttering in the case of a work orally communicated and from the date of making in the case of a work produced in permanent form. Letters, speeches, and sermons all fall within this principle, and thus the difficulties under the old law of determining the rights of those who deliver or report speeches (*r*) or who write or publish letters are almost entirely swept away (*s*). In each case a copyright, which includes the exclusive right of publishing or delivering a speech or of publishing a letter, vests in the speaker of the speech or the writer of the letter. That copyright can only be assigned in writing, and therefore there can be no question of abandonment to the public or to the recipient of a letter.

Existing law.—Unpublished works, whether the works of British subjects or foreigners, and wherever situate, are protected by the common law from infringement in the British dominions (*t*). This common law right is a proprietary right, and gives the author and his representatives the exclusive right of multiplying copies of or publishing the literary or artistic matter in the work (*u*). This principle has been applied so as to protect the author's right in unpublished manuscript (*v*), unpublished plays (*w*) and lectures (*x*), letters (*y*), collected news distributed from a news agency (*z*), un-

(*r*) *Walter* v. *Lane*, [1900] A. C. 539.

(*s*) *Macmillan* v. *Dent*, [1907] 1 Ch. 107; *Philip* v. *Pennell*, [1907] 2 Ch. 577.

(*t*) *Millar* v. *Taylor* (1769), 4 Burr. 2303, 2379; *Donaldson* v. *Beckett* (1774), 2 Bro. P. C. 129; Cob. Parl. Hist., Vol. 17, p. 954.

(*u*) *Millar* v. *Taylor* (1769), 4 Burr. 2303, 2379; *Caird* v. *Sime* (1887), 12 A. C. 326; *Prince Albert* v. *Strange* (1849), 1 M'N. & G. 25; 2 De G. & Sm. 652, 691, 693; *Mansell* v. *Valley Printing Co.*, [1908] 2 Ch. 441.

(*v*) *Forrester* v. *Walker* (1741), 4 Burr. 2408; *Webb* v. *Rose* (1732), Amb. 694.

(*w*) *Macklin* v. *Richardson* (1770), Amb. 694.

(*x*) *Abernethy* v. *Hutchinson* (1825), 3 L. J. (O. S.) Ch. 209; *Caird* v. *Sime* (1887), 12 A. C. 326; *Nicols* v. *Pitman* (1884), 26 Ch. D. 374.

(*y*) *Pope* v. *Curl* (1741), 2 Atk. 342; *Duke of Queensberry* v. *Shebbeare* (1758), 2 Eden, 329; *Thompson* v. *Stanhope* (1774), Amb. 737; *Earl of Granard* v. *Dunkin* (1809), 1 Ball & B. 207; *Lord Perceval* v. *Phipps* (1813), 2 V. & B. 19, 24; *Gee* v. *Pritchard* (1818), 2 Swans. 402; *Oliver* v. *Oliver* (1861), 11 C. B. (N. S.) 139; *Howard* v. *Gunn* (1863), 32 Beav. 462; *Hopkinson* v. *Lord Burghley* (1867), L. R. 2 Ch. 447; *Earl of Lytton* v. *Devey* (1884), 54 L. J. Ch. 293.

(*z*) *Exchange Telegraph* v. *Gregory*, [1896] 1 Q. B. 147; *Exchange Telegraph* v. *Central News*, [1897] 2 Ch. 48.

published drawings (*c*), and paintings (*d*), and unpublished photographs (*e*). Where any such things are reproduced or published without the consent of the author or his representatives, he can recover damages, possession of copies, and an injunction from any person who has dealt with the infringements, and this notwithstanding that he was ignorant of the infringement (*d*). The proprietary common law right in an unpublished document does not give the author and his representative an exclusive right of making any use of it, but is apparently confined to the right of multiplying copies of and publishing the literary or artistic matter contained therein (*f*). That is to say, in so far as proprietary right is concerned the ambit of the common law right is probably much the same as the ambit of the statutory copyright. In addition to the proprietary right, the author of an unpublished document has the right to restrain any use of the document, or of the matter contained therein, which is a breach of contract or confidential relationship (*g*), and to restrain any third party who proposes, knowing the illegal source, to make use of information so obtained (*h*).

All common law proprietary right ceases on publication, and thereafter if the copyright statutes do not give protection, there is no property in the nature of copyright in the literary or artistic work (*i*). The proprietor cannot, by means of notice of reservation printed in a published work, reserve to himself any monopoly not given to him by statute (*k*). The utmost he can do in this direction is to contract with individual purchasers that they shall not make use of the work in a specified manner (*k*).

(*c*) *Prince Albert* v. *Strange* (1849), 1 Mc.N. & G. 25; 2 De G. & Sm. 652.

(*d*) *Mansell* v. *Valley Printing Co.*, [1908] 2 Ch. 441.

(*e*) *Bowden Bros.* v. *Amalgamated Pictorials*, [1911] 1 Ch. 386.

(*f*) *Philip* v. *Pennell*, [1907] 2 Ch. 577. See, however, *Millar* v. *Taylor* (1769), 4 Burr. 2303, 2379; *Tonson* v. *Walker* (1752), 3 Swans. 672; *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652, 691, 693.

(*g*) *Jocatt* v. *Wingard* (1820), 1 Jac. & W. 394; *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652; *Reuter's Telegram Co.* v. *Byron* (1874), 43 L. J. Ch. 661; *Lamb* v. *Evans*, [1893] 1 Ch. 218; *Merrywcather* v. *Moore*, [1892] 2 Ch. 518; *Lonis* v. *Smellie* (1895), 11 T. L. R. 515; *Robb* v. *Green*, [1895] 2 Q. B. 315; *Gilbert* v. *Star Newspaper* (1894), 11 T. L. R. 4; *Tuck* v. *Priester* (1887), 19 Q. B. D. 629; *Murray* v. *Heath* (1831), 1 B. & Ad. 804; *Magull* v. *Higbey* (1862), 1 H. & C. 148; *Pollard* v. *Photographic Co.* (1888), 40 Ch. D. 345.

(*h*) *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815; *Tipping* v. *Clarke* (1843), 2 Hare, 383, 393; *Abernethy* v. *Hutchinson* (1825), 3 L. J. (O. S.) Ch. 209; *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652; *Exchange Telegraph* v. *Central News*, [1897] 2 Ch. 48; *Bridgman* v. *Green* (1755), 2 Ves. sen. 627; Wilmot's Cases, 58; *Morison* v. *Moat* (1851), 9 Hare, 241; *Barfield* v. *Nicholson* (1824), 2 Sim. & Stu. 1.

(*i*) *Donaldson* v. *Beckett* (1774), 2 Bro. P. C. 129; Cob. Parl. Hist., Vol. 17, p. 954; *Coleman* v. *Wathen* (1793), 5 T. R. 245; *Murray* v. *Elliston* (1822), 5 B. & Ald. 657; *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815; *Reade* v. *Conquest* (1861), 9 C. B. N. S. 755; *Caird* v. *Sime* (1887), 12 A. C. 326, 343, 344; *Mansell* v. *Valley Printing Co.*, [1908] 2 Ch. 441, 447.

(*k*) *Monckton* v. *Gramophone Co.* (1910), The Times, Dec. 6; *Bobbs-Merrill Co.* v. *Snellenburg* (1904), 131 Fed. Rep. 530; *M'Gruther* v. *Pitcher*, [1904] 2 Ch. 306; *Taddy* v. *Sterious*, [1904] 1 Ch. 354.

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Publication of a literary or artistic work in this connexion means communication to the public in general either orally or by means of exhibition, circulation of copies, or otherwise (*l*). The following acts of communication are, for instance, not deemed to be a publication so as to divest the common law right: (i) private or business letters sent to a correspondent or shown to friends or other interested persons (*m*); (ii) a manuscript or artistic work delivered or exhibited to a friend for his personal perusal or view, or to a publisher or other person or persons with a view to obtaining his or their opinion, or arranging for the publication or sale of the work (*n*); (iii) a book or artistic work printed or otherwise multiplied and distributed among a limited class, such as friends of the author or members of a society (*o*); (iv) a work of art exhibited in a place to which the public are admitted only upon payment and subject to rules prohibiting, *inter alia*, the making of any sketches or copies of the picture (*p*); (v) a dramatic or musical work performed in a theatre or other place to which the public are admitted for payment on the implied understanding that they are admitted solely for their entertainment and amusement (*q*); (vi) a lecture delivered to a class of students in a university, or to any other limited class of the public, or in a place to which the public are admitted for payment, in each case upon the implied understanding that the lecture is delivered solely for the instruction of those present (*r*).

Meaning of "author."

The author of a work is the person from whom emanates the general conception and design. Where, in order to achieve the final result, the author employs other persons to prepare detailed portions, which will ultimately be worked into the main design, the work of the persons executing the details, under the instruction of the author, merges in the final work, and all becomes the property of the author as the principal designer (*s*). The mere suggestion, however, of a subject or idea which is then entirely designed and executed by another does not con-

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(*l*) *Caird* v. *Sime* (1887), 12 A. C. 326; *Macmillan* v. *Dent*, [1907] 1 Ch. 107; *Jewellers* v. *Jewellers* (1895), 84 Hun. 12.

(*m*) *Pope* v. *Curl* (1741), 2 Atk. 342.

(*n*) *Caird* v. *Sime* (1887), 12 A. C. 326. See, however, *Blank* v. *Footman* (1888), 39 Ch. D. 678; *Southey* v. *Sherwood* (1817), 2 Mer. 435.

(*o*) *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652; *Kenrick* v. *Danube Collieries* (1891), 39 W. R. 473; *Exchange Telegraph* v. *Central News*, [1897] 2 Ch. 48.

(*p*) *Werckmeister* v. *American Lithograph Co.* (1904), 134 Fed. Rep. 321; *Turner* v. *Robinson* (1860), 10 Ir. Ch. 121, 510.

(*q*) *Macklin* v. *Richardson* (1770), Amb. 694; *D'Almaine* v. *Boosey* (1835), 1 Y. & C., Ex. 288.

(*r*) *Abernethy* v. *Hutchinson* (1825), 3 L. J. (O. S.) Ch. 209; *Caird* v. *Sime* (1887), 12 A. C. 326; *Nicols* v. *Pitman* (1884), 26 Ch. D. 374.

(*s*) *Scott* v. *Stanford* (1867), L. R. 3 Eq. 718; *Barfield* v. *Nicholson* (1824), 2 Sim. & Stu. 1; *Hatton* v. *Kean* (1859), 7 C. B. (N. S.) 268; *Wallerstein* v. *Herbert* (1867), L. T. 453.

stitute the originator of the idea an author, even although the actual composer is his employee (*t*). In the case of photographs, records, perforated rolls and other contrivances by means of which a work may be mechanically performed or delivered, the Act sets up an arbitrary test of authorship by providing that the author shall be deemed to be the person who was the owner of the original negative or matrix at the time it was made (*u*). § 1 (1).

Joint authorship is now defined as a work produced by the collaboration of two or more authors, in which the contribution of one is not distinct from the contribution of the other author or authors. This is probably merely a declaration of the existing law. There must be joint labour in the prosecution of a preconcerted joint design (*x*). From joint authorship there must be excluded, on the one hand, cases of the kind referred to in the last paragraph, where the whole work is the conception of one brain, and the work done by others is merely that of subordinate detail, and on the other hand, cases where the contribution of the different contributors is distinct.

(2) For the purposes of this Act, "copyright" means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever (*y*), to perform (*z*), or in the case of a lecture (*a*) to deliver (*b*), the work or any substantial part thereof in public; if the work is unpublished (*c*), to publish the work or any substantial part thereof; and shall include the sole right,— § 1 (2). Copyright.

(a) to produce, reproduce, perform, or publish any translation of the work;

(*t*) *Shepherd* v. *Conquest* (1856), 17 C. B. 427; *Nottage* v. *Jackson* (1883), 11 Q. B. D. 627.
(*u*) Sects. 19 (1), 21.
(*x*) *Levy* v. *Ratley* (1871), L. R. 6 C. P. 523; *Tree* v. *Bowkett* (1896), 74 L. T. 77.
(*y*) Sects. 2 (1) (i) (ii) (iii) (iv) (v), 3, 4, 19 (2), 20.
(*z*) Sects. 2 (1) (vi), 35 (1) ("Performance").
(*a*) Sect. 35 (1) ("Lecture").
(*b*) Sect. 35 (1) ("Delivery").
(*c*) Sects. 1 (3), 31, 35 (2).

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(b) in the case of a dramatic work (*d*), to convert it into a novel or other non-dramatic work;

(c) in the case of a novel or other non-dramatic work, or of an artistic work (*e*), to convert it into a dramatic work, by way of performance in public or otherwise;

(d) in the case of a literary (*f*), dramatic, or musical work, to make any record, perforated roll, cinematograph film (*g*), or other contrivance by means of which the work may be mechanically performed or delivered (*h*),

and to authorise any such acts as aforesaid.

Meaning of "copyright."

This sub-section puts every work which is protected by the Act upon the same basis, and defines the author's right therein in very generous terms. Copyright, it will be noticed, now includes all the author's proprietary rights in his work, and has, in fact, become the *droit d'auteur* of the Frenchman, or the *urheberrecht* of the German. It includes all the rights formerly known as (1) common law proprietary right in unpublished works; (2) statutory copyright; (3) statutory performing right or play right. The definition is framed so as to secure that, whatsoever medium the author may select for giving expression to his work, the essential elements of the work which he as an author has created shall be protected from reproduction in the same or any other medium. Thus, the author who uses no other medium for the expression of his literary conception than that of oral utterance is protected not only against the repetition of it in that form.

(*d*) Sect. 35 (1) ("Dramatic work").
(*e*) Sect. 35 (1) ("Artistic work").
(*f*) Sect. 35 (1) ("Literary work").
(*g*) Sect. 35 (1) ("Cinematograph").
(*h*) Sect. 19.

but against the production or reproduction of it in any material form, as, for instance, in the form of a newspaper report or gramophone record. On the other hand, the author who first expresses his literary conception through the medium of pen and ink is protected against acoustic repetition as well as against all forms of material production or reproduction. The only exception to the generality which is contained in this sub-section is that the exclusive right of performance is confined to performance in public. Other more specific exceptions are contained in sect. 2 of the Act. The enumeration at the end of the sub-section of certain specific forms of reproduction are for the purpose of making it clear that such things were in the mind of the Legislature at the time, and to prevent the generality of the first part of the sub-section being cut down by reference to previously decided cases, and by any possible suggestion that the definition of copyright was intended to be merely declaratory. It is conceived that the specific enumeration does not in any way restrict the meaning of the general words, but has, in effect, a contrary tendency showing that the general words must be construed with sufficient liberality to include the matters specified as well as matters *ejusdem generis*.

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These words relate to the recording of the work or any of the essential elements thereof in any physical and more or less permanent form. These, and the complementary words "to perform" are intended to include every possible user of a work by which the commercial value of it may be realised. Copyright in a book may be infringed by the making of records or similar mechanical devices, or by the setting up of type or by the making of stereotype or linotype. Copyright in a drawing or picture may be infringed by the making of a work of sculpture, or the erection of an architectural work.

Meaning of "to produce or reproduce in any material form."

The exclusive nature of the right of reproduction is modified—

Statutory exceptions from the sole right of reproduction.

(1) By the provisions in sect. 2 (1) relating to—

(i) Fair dealing for the purpose of private study, research, criticism, review, or newspaper summary;

(ii) An artist's use of his models and studies;

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(iii) Reproductions in the flat of—
(a) Sculpture or artistic work situate in a public place or building;
(b) Architectural works;
(iv) Reproduction of extracts in school books;
(v) Newspaper report of a lecture delivered in public.

(2) By the provisions of sect. 20 permitting a newspaper report of any political speech delivered at a public meeting;

(3) By the provisions in sect. 19 (2) relating to the right to manufacture records and perforated rolls upon payment of a royalty to the composer;

(4) By the provisions in the proviso in sect. 3 relating to the right to reproduce any work after the expiration of twenty-five (or thirty) years after the author's death.

(5) By the provisions of sect. 4 relating to the granting of compulsory licences by the Privy Council at any time after the death of the author.

Existing law. Under the legislation now in force the author's exclusive right in a book is limited to the right of multiplying copies. So long as a copy of the book is not made, the literary production may be utilised in other material forms. A perforated roll for the pianola (*i*), a gramophone or phonograph record (*k*), a cinematograph film, are not infringements of the copyright in a book or sheet of music.

Copyright in a book may be infringed by reproduction otherwise than in print. Copies produced by writing (*l*), lithography (*m*), typewriting (*n*) or photography (*o*), are copies within the meaning of the Copyright Act, 1842.

Copyright in engravings, paintings, drawings and photographs may be infringed by any reproduction of the artistic design in the flat although not in the same form of art. Copyright in an

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(*i*) *Boosey* v. *Whight*, [1900] 1 Ch. 122; *Mabe* v. *Connor*, [1909] 1 K. B. 515.

(*k*) *Monckton* v. *The Gramophone Co.* (1910), Cop. Cas. 1905-10, p. 304; The Times, December 6; *Newmark* v. *National Phonograph Co.* (1907), 23 T. L. R. 439.

(*l*) *White* v. *Geroch* (1819), 2 B. & Ald. 298; Lindley, M.R., in *Boosey* v. *Whight*, [1900] 1 Ch. 122, 123.

(*m*) *Novello* v. *Sudlow* (1852), 12 C. B. 177.

(*n*) *Warne* v. *Seebohm* (1888), 39 Ch. D. 73.

(*o*) Lindley, M.R., in *Boosey* v. *Whight*, [1900] 1 Ch. 122, 123.

engraving may be infringed by a photograph (*p*). Copyright in a painting may be infringed by a photograph or pencil sketch (*q*).

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It is doubtful whether a reproduction in the round of an artistic work on the flat or *vice versâ* can be an infringement; that is to say, whether copyright in a painting can be infringed by the reproduction of the design in the form of a work of sculpture or whether copyright in a work of sculpture can be infringed by a painting, drawing, or photograph (*r*).

The representation of a painting in the form of a *tableau vivant* is not an infringement of the copyright in the painting (*s*).

Meaning of "any substantial part thereof."

The words "any substantial part thereof" express what has been decided under the Copyright Act, 1842, upon the construction of the phrase, "multiplying copies." The sole right of making copies is held to include the sole right of making copies of any part. This deduction, coupled with the maxim, *de minimis non curat lex*, resulted in the decisions to the effect that it was an infringement to take a substantial part, but that it was not an infringement to take an insignificant particle (*t*). The question as to what is substantial is not altogether one of quantity, it is, perhaps, mainly one of quality, and depends on the character of the work and the relative value of the material taken (*u*). The following are among the considerations which are relevant on the question of substantiality; what proportion does the material taken bear to (i) the work infringed, (ii) the infringing work (*x*); will the infringing work compete with the work

(*p*) *Graves* v. *Ashford* (1867), L. R. 2 C. P. 410; *Gambart* v. *Ball* (1863), 14 C. B. N. S. 306; *Guggenheim* v. *Lenz* (1896), 12 T. L. R. 491.

(*q*) *Beal, Ex parte* (1868), 3 Q. B. 387; *Bolton* v. *Aldin* (1895), 65 L. J. Q. B. 120.

(*r*) See *Hanfstaengl* v. *Baines*, [1895] A. C. 20; *Hanfstaengl* v. *Empire Palace*, [1894] 2 Ch. 1; [1894] 3 Ch. 109.

(*s*) *Hanfstaengl* v. *Empire Palace*, [1894] 2 Ch. 1.

(*t*) *Chatterton* v. *Cave* (1878), 3 A. C. 483, 498; (1875), L. R. 10 C. P. 572, 575; *Sweet* v. *Benning* (1855), 16 C. B. 459, 481; *Bohn* v. *Bogue* (1846), 10 Jur. 420; *Jarrold* v. *Heywood* (1870), 18 W. R. 279; *Baily* v. *Taylor* (1829), 1 R. & M. 73; *Planché* v. *Braham* (1837), 8 C. & P. 68; *Beere* v. *Ellis* (1889), 5 T. L. R. 330.

(*u*) *Leslie* v. *Young*, [1894] A. C. 335, 341, 342; *Tinsley* v. *Lacey* (1863), 1 H. & M. 747; *Bramwell* v. *Halcomb* (1836), 3 My. & Cr. 737, 738; *Bradbury* v. *Hotten* (1872), L. R. 8 Ex. 1; *Cooper* v. *Stephens*, [1895] 1 Ch. 567; *Scott* v. *Stanford* (1867), L. R. 3 Eq. 718; *Murray* v. *Bogue* (1852), 1 Drew. 353, 369; *Cary* v. *Kearsley* (1802), 4 Esp. 168; *Lennie* v. *Pillans* (1843), 5 D. 416.

(*x*) *Macmaw* v. *Tegg* (1826), 2 Russ. 385, 394; *Neale* v. *Harmer* (1897), 13 T. L. R. 269; *Kelly* v. *Hooper* (1841), 1 Y. & C. Ch. C. 197; *Cooper* v. *Stephens*, [1895] 1 Ch. 567.

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infringed (*y*); was there an intention to appropriate, or was the appropriation casual and inadvertent (*z*).

Similarly, in the case of paintings and other works of art, it is an infringement to copy any substantial part of the work or the design thereof (*a*). It is not an infringement when nothing is taken but that which is trivial and unimportant (*b*).

The taking of a general scheme or idea is not an infringement either of a literary (*c*) or artistic work (*d*) where such scheme or idea is applied and worked out independently by the author of the second work from his own materials.

"To perform in public."

By the definition clause, "performance" means any acoustic representation of a work and any visual representation of any dramatic action in a work including such a representation made by means of any mechanical instrument.

These words are intended to bring under protection all forms of user which are transitory and fleeting and do not consist in the making of any permanent record of the work. Performing right is no longer confined to dramatic and musical works, but is extended to all classes of works protected by the Act, so that wherever any original element in a work can be turned to profit by some form of transitory representation, the exclusive right of making such use of the work is *primâ facie* vested in the author as part of his copyright. The exclusive right of representing a work in some transitory form is, however, and almost necessarily so, confined to public representation. Performances of dramatic or musical works.

(*y*) *Trade Auxiliary* v. *Middlesborough* (1889), 40 Ch. D. 425; *Cate* v. *Devon* (1889), 40 Ch. D. 500; *Weatherby & Sons* v. *International Horse Agency*, [1910] 2 Ch. 297.

(*z*) *Jarrold* v. *Houlston* (1857), 3 K. & J. 708; *Reade* v. *Lacey* (1861), 1 J. & H. 524; *Spiers* v. *Brown* (1858), 6 W. R. 352.

(*a*) *Brooks* v. *Religious Tract Society* (1897), 45 W. R. 476; *West* v. *Francis* (1822), 5 B. & Ald. 737; *London Stores* v. *Kelly* (1888), 5 T. L. R. 169; *Bolton* v. *London Exhibitions* (1898), 14 T. L. R. 550.

(*b*) *Guggenheim* v. *Lenz* (1896), 12 T. L. R. 491.

(*c*) Lindley, L. J., in *Hollinrake* v. *Truswell*, [1894] 3 Ch. 420, 427; *Jarrold* v. *Houlston* (1857), 3 K. & J. 708; *Morris* v. *Ashbee* (1868), L. R. 7 Eq. 34; *Lennie* v. *Pullans* (1843), 5 D. 416; *Mawman* v. *Tegg* (1826), 2 Russ. 385; *Lamb* v. *Evans*, [1893] 1 Ch. 218, 224; *Pike* v. *Nicholas* (1869), L. R. 3 Ch. 251, 260.

(*d*) *Hanfstaengl* v. *Baines*, [1895] A. C. 20; *Moore* v. *Clarke* (1842), 9 M. & W. 692.

recitations, cinematograph shows, and all similar transitory representations of a work are not infringements of copyright where the entertainment is obviously domestic and private. In order to constitute a public performance there must be present members of the public admitted as such. Admission by payment is not the test of publicity or non-publicity. The performance of a dramatic or musical work may be gratuitous, and yet, if it is performed in the presence of members of the general public, it is a public performance. Where a dramatic piece was represented in a room in Guy's Hospital for the entertainment of the medical officers, nurses, students and attendants, and some of their friends, it was held that there was no infringement of performing right under the Dramatic Copyright Act, 1833 (*e*). The tests applied in that case are equally applicable to the new law in so far as the distinction between public and private representation is concerned.

Where the makers of cinematograph films exhibited them in their business premises to intending customers, it was held, under the Dramatic Copyright Act, 1833, that there was no performance in a place of dramatic entertainment within the meaning of that Act (*f*), and, similarly, such a representation would not be a public performance within the meaning of the new Act.

The exclusive right of representation in public is modified by the provisions of sect. 2 (1) (vi) relating to the reading or recitation in public by one person of any reasonable extract from a published work. Under sect. 2 (3), proceedings for infringement of performing right may be taken against any person who, for private profit, permits a theatre or other place of entertainment to be used for an unlawful performance.

"In the case of a lecture to deliver."

The specific reference to the delivery of a lecture is inserted to make it clear that this is part of the author's copyright. As, however, this right would be included in the right to perform as that is now defined, it is a little out of place as part of the general definition. The reference to the right of delivering lectures would have come more appropriately among the

(*e*) *Duck* v. *Bates* (1884), 13 Q. B. D. 843.
(*f*) *Glenville* v. *Selig Polyscope Co.* (1911), The Times, July 20.

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matters specifically mentioned in the paragraphs following the definition as being part of the copyright. Even as it stands, however, it is conceived that it will not affect the generality of the right of "performance" in respect of all other works. Thus, subject to the limitation contained in sect. 2 (1) (vi) as to the reading or recitation of reasonable extracts, it is submitted that it is an infringement of copyright under the Act to read any literary work in public, even although such work does not come within the definition of the word "lecture."

Existing law.—There is no statutory exclusive right of delivering a lecture. The Lectures Copyright Act, 1835 (*g*), protects the right of printing and publishing only. A lecture is protected at common law so long as it is unpublished (*h*). It is not published merely by delivery to a class of students in a university or college, and if any one were to publish or deliver such lecture without the author's consent, the author could stop him under the common law right (*h*). But if the lecture is delivered by the author in a public place his common law right is divested. As such delivery did not vest copyright under the statutes relating to books, some protection was required until such time as the author should publish his lecture in print, and the Lectures Copyright Act, 1835 (*g*), was devised so as to preserve to the author, who had delivered his lecture in public, the exclusive right of afterwards printing and publishing it. A condition precedent to protection under the Act is the delivering of a written notice to two justices living within five miles of the place where the lecture is to be delivered, at least two days before the delivery of the lecture, and the Act does not apply to any lecture or lectures delivered in any public school or college, or in accordance with any gift, endowment, or foundation. The delivery, however, of the last-mentioned class of lecture is not necessarily a delivery in public so as to divest the common law right, and therefore the publication of such lectures may be restrained at common law (*h*).

"If the work is unpublished to publish the work."

The meaning of publication is defined in the next subsection as being the issue of copies of the work to the public. Thus, in an unpublished work, the proprietary right includes the exclusive right of (1) production or reproduction; (2) performance in public; (3) issue of copies to the public. It will be observed that it does not

(*g*) 5 & 6 Will. IV. c. 65.

(*h*) *Caird* v. *Sime* (1887), 12 A. C. 326; *Abernethy* v. *Hutchinson* (1825), 3 L. J. (O. S.) Ch. 209; *Nicols* v. *Pitman* (1884), 26 Ch. D. 374.

(*k*) *Caird* v. *Sime* (1887), 12 A. C. 326.

include (a) exhibition of the work in public, (b) the issue of photographs and engravings of works of sculpture and architectural works of art; if such acts are complained of as being done without the permission of the author or other proprietor of the copyright in an unpublished work, no action will lie for infringement of a proprietary right, since the common law right is abrogated. The only ground upon which such unauthorised acts can be stopped is breach of contract or breach of trust arising from confidential relationship.

Existing law.—The ambit of the common law proprietary right in unpublished works has always been a matter of some doubt. In *Philip* v. *Pennell* (*l*), Kekewich, J., came to the conclusion that the common law proprietary right in letters went no further than to protect the proprietor from the multiplication of copies and publication of the literary composition contained in the letters. In his view there was no property in the information or facts contained in the letters, and although under certain circumstances it might be a breach of contract or trust to divulge such information or facts, it was no infringement of the common law right of property to do so or to use the information or facts for the purpose of compiling and publishing an independent publication such as a biography of the person who wrote the letters. On the other hand, there is some authority in support of the proposition that the proprietary right in an unpublished document or work of art was a much wider right than the statutory copyright or the mere right of multiplying and publishing copies, and that it did include an exclusive right to make any public use of the facts or information contained therein, except in so far as the author of the document or work of art had expressly or impliedly permitted such use (*m*). In many of the cases, however, there is a want of clear distinction between the right to an injunction on the ground of property and the right to an injunction on the ground of breach of trust, and most of the decisions could be supported on the latter ground alone, and are, therefore, not very strong authorities in support of the theory of the wider common law right of property.

"Any translation of the work."

The object of paragraph (a) is to make it clear that the author of any work shall have the exclusive translating right for the full term of the copyright in the original. This is in accordance with Articles VIII. and XI. of the Berlin Convention.

Existing law.—Apart from the International Copyright Acts, the existence of any exclusive right of translation has always been

(*l*) [1907] 2 Ch. 577.

(*m*) *Millar* v. *Taylor* (1769), 4 Burr. 2303, 2379; *Tonson* v. *Walker* (1752), 3 Swans. 672; *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652, 691, 693.

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open to doubt. There are several dicta to be found in the earlier decisions to the effect that a translation is not an infringement under the Copyright Act, 1842 (*u*). These were followed by two decisions in India, where it was held that a translation into an Indian language of an English school book was not an infringement of the copyright (*o*). The principle upon which these were decided seems to depend on the theory that if the *ipsissima verba* are not extracted from a literary work, the whole selection and arrangement of subject-matter can be taken with impunity. This theory is quite contrary to recent English decisions, and it is conceived that if the Indian decisions had been appealed against they would have been reversed by the Judicial Committee of the Privy Council (*p*).

With regard to works protected under the International Copyright Acts, the foreign author receives a definite but conditional translating right. The Berne Convention, Article V., demanded an exclusive translating right for ten years. The International Copyright Act, 1886, was, however, more generous to the foreign author, and gave him an exclusive translating right for the full term of the copyright provided the author did, within ten years after the first production of his work, cause a translation to be produced in the English language (*q*). If a full and substantial translation (*r*) is not produced within the prescribed period, the work becomes free as far as the English language is concerned, and can be reprinted or performed in English either in whole or in part (*s*). The Act of Paris, 1896, Article I. 3, demanded similar protection, that is, full translating right conditional upon the exercise of the right within ten years. This, however, entailed no change in the English law, as the international demand had already been satisfied by the Act of 1886.

"In the case of a dramatic work to convert it into a novel or other non-dramatic work."

The exclusive right to turn a dramatic work into a non-dramatic work is probably vested in the author under existing law. It has never actually been decided that it would be an infringement of the copyright in a play to take the plot and characters and principal situations and write a novel based thereon. It has been said that so long as there is no copying of the words there is no infringement. Probably, however, it is an infringement,

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(*u*) *Burnett* v. *Chetwood* (1720), 2 Meriv. 441; *Millar* v. *Taylor* (1769), 4 Burr. 2348; *Prince Albert* v. *Strange* (1849), 2 De G. & M. 693; and see *Wyatt* v. *Barnard* (1814), 3 V. & B. 77; *Murray* v. *Bogue* (1852), 1 Drew. 353.

(*o*) *Munshi* v. *Mirza* (1890), Ind. L. R. 14 Bomb. 586; *Macmillan* v. *Shamsul* (1894), Ind. L. R. 19 Bomb. 557.

(*p*) *Moffat and Paige* v. *Gill & Sons* (1902), 86 L. T. 465.

(*q*) Int. Cop. Act, 1886, s. 5.

(*r*) *Wood* v. *Chart* (1870), L. R. 10 Eq. 193; *Lauri* v. *Renad*, [1892] 3 Ch. 402, 414.

(*s*) *Gandillot* v. *Edwardes* (1908), The Times, June 3, Cop. Cas. 1905—10, p. 169.

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even under existing law, to take a plot and re-write the story, and there is no doubt that under the Act the stealing from a play of a substantial portion of a plot and the utilisation of it as the basis of a non-dramatic work of fiction would be an infringement.

"In the case of a novel to convert it into a dramatic work."

Copyright will include performing right, and every work will be protected in respect of performing right notwithstanding the absence of dramatic form in the work as first produced. Paragraph (c) merely emphasizes this principle by giving the most common case, dramatisation of a novel for the stage, as a specific instance of the exclusive right which every author has of turning to account, for his own profit, any dramatic element which the work contains.

Existing law.—The representation on the stage of a dramatic version of a novel is not an infringement of the author's right in the novel (*t*). Copyright under the Act of 1842 does not include performing right, and unless the author produces his work in the form of a dramatic piece he gets no protection under the Dramatic Copyright Act, 1833 (*u*). Printing, typing, or writing a dramatic version of a novel may infringe the copyright. It has been doubted whether it does so, if nothing but the plot is taken and the dialogue is entirely original; but if any substantial passages from the novel are introduced into the play as part of the dialogue the printing, typing, or writing such play is undoubtedly an infringement of the copyright in the novel. In *Warne* v. *Seebohm* (*x*), a novel was dramatised without the author's consent and four typed copies of the dramatic version were made. It was held there was an infringement of copyright, and an injunction was granted. As a copy of every dramatic work must be sent to the Lord Chamberlain before it is produced on the stage the decision in *Warne* v. *Seebohm* (*x*) did in substance confer upon the author of novels the exclusive right of dramatisation.

"To make any record, perforated roll, cinematograph film."

The exclusive right to make any record, perforated roll, or cinematograph film is, again, merely a specific instance of the author's exclusive right to all forms of user. All forms of mechanical instruments appear to be included in the specific words of paragraph (d). It was stated in Grand Committee on the Bill that it was not intended to give a musical composer the exclusive right of making

(*t*) *Tinsley* v. *Lacy* (1863), 1 H. & M. 747; *Murray* v. *Elliston* (1822), 5 B. & Ald. 657; *Reade* v. *Conquest* (1861), 9 C. B. (N. S.) 755; *Toole* v. *Young* (1874), L. R. 9 Q. B. 523.

(*u*) 3 & 4 Will. IV. c. 15.

(*x*) (1888), 39 Ch. D. 73.

§ 1 (2).

a barrel organ upon which his composition could be performed. It is submitted that both the general words of the sub-section and the specific words of this paragraph do give the musical composer the monopoly of making barrel organs and similar instruments. There is nothing which can be construed as confining the author's right to the making of interchangeable parts.

Existing law.—A literary work is only protected as a book, and the exclusive right of the author is limited to making copies of the book. The author of a dramatic or musical work has the exclusive right of making copies if it is published as a book or sheet of music, and he has the exclusive right of public performance. A record, perforated roll, or cinematograph film is not a copy of the book or sheet of music, even although it reproduces the whole dramatic or musical element contained in the book or sheet of music. The making of such things is therefore not an infringement of copyright (*y*). Neither does the person who makes such things infringe the performing right in the dramatic or musical work notwithstanding that he sells them to persons whom he knows will use them for giving public performances. He does not, by making and selling the record or film, cause the public performance (*z*); neither does he infringe the performing right by exhibiting the films in his business premises to his customers and possible purchasers (*a*).

"And to authorise any such acts as aforesaid."

The last words of sub-sect. 1 (2) appear to be superfluous. It is clear that if a person has the sole right to do certain acts, no other person can have the right to authorise such acts. The words are therefore unnecessary in so far as they are intended to exclude third persons from any enjoyment of the work. If they are intended to accentuate the fact that the owner of the copyright may authorise other people to exercise his exclusive right, the words are equally unnecessary, as the power to license others is obviously incidental to the exclusive right of doing the acts in question.

§ 1 (3).

(3) For the purposes of this Act, publication (*b*), in relation to any work, means the issue of copies

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(*y*) *Boosey* v. *Whight* [1900] 1 Ch. 122; *Newmark* v. *National Phonograph Co.* 1907), 23 T. L. R. 439; *Mabe* v. *Connor*, [1909] 1 K. B. 515; *Monckton* v. *Gramophone Co.* (1910), The Times, Dec. 6; Cop. Cas. 1905–10, p. 304.

(*z*) *Karno* v. *Pathé Frères* (1909), 25 T. L. R. 242.

(*a*) *Glanville* v. *Selig Polyscope Co.* (1911), The Times, July 20.

(*b*) Sects. 31, 35 (2).

of the work to the public, and does not include the performance in public of a dramatic or musical work, the delivery in public of a lecture, the exhibition in public of an artistic work, or the construction of an architectural work of art, but, for the purposes of this provision, the issue of photographs and engravings of works of sculpture and architectural works of art shall not be deemed to be publication of such works. § 1 (3).

Meaning of "publication."

This definition of publication brings the provisions of our law upon this point into substantial conformity with the definition in the Berlin Convention. As the international right of the author may depend upon whether or not his work has been published, and, if published, where it was first published, it is important that all the countries of the union should adopt the same definition. The proviso at the end of the sub-section is a modification of the definition in the Berlin Convention. The Convention is silent upon the question as to how far the publication of a derivative work is to be deemed a publication of the original work from which it is derived. The principle which the proviso is intended to express is that where, in the case of an artistic work, the original is in three dimensions, a derivative work in the flat shall not be deemed to be a publication of the original. It is, perhaps, a little unfortunate that this modification has been introduced into the definition agreed upon at Berlin. Where a derivative work such as a photograph or engraving of a painting or work of sculpture is published, there is in either case a publication of the greater part, but not of the whole of the artistic elements which go to make up the original work. There is a residuum of the artistic elements which is left unpublished, but that residuum may be just as important in the case of a photograph of a picture as in the case of a photograph of a work of sculpture. It is therefore extremely arbitrary and artificial to provide that the publication of a photograph of a picture shall be deemed to be a publication of the picture, but that the publication of a photograph of a work of sculpture shall not be deemed to be a pub-

§ 1 (3).

lication of the work of sculpture. It is submitted that it would have been much more satisfactory if the last three lines in the sub-section had been omitted. The result would have been that each artistic element in an original work would have stood by itself and would be protected as being published or unpublished according to whether it was or was not reproduced in the published photograph or other derivative work. Probably, even as the definition stands, this is the only way in which it can be applied. It is practically impossible to provide that every original work must either be deemed to be published or unpublished in its entirety. Where certain features only of an original work are published in a derivative work, and other features are left unpublished, it would be impossible to lay down a rule by which it could be determined in all cases whether or not the original work was published. Probably the best construction to put upon the words of the proviso is that they do not contain an exception from the general definition of publication, but are merely an attempt to express the consequences of its application to the specific subjects dealt with, and even so that they do not completely express such consequences. It is submitted that, although the issue of a photograph or engraving of a work of sculpture or architectural work is not a publication of such work, meaning thereby the entire work, it is a publication of some essential elements of the work, and to that extent the work must be deemed to be published.

Existing Law.—Publication is of one of two kinds—either that which divests the common law right or that which invests some statutory right. With regard to divestitive publication, the issue of copies to the public is not an essential element. Any communication of the work to the public is a publication, whether oral or otherwise (*c*). There is, however, no communication to the public in this sense if the communication is to a strictly limited class, or is made to members of the public upon conditions imposed by contract express or implied, or by some confidential relationship existing between the parties (*d*). It has been held that a lecture delivered to a class of students at a public university is not a

(*c*) *Walter* v. *Lane*, [1900] A. C. 539; *Caird* v. *Sime* (1887), 12 A. C. 326; *Turner* v. *Robinson* (1860), 10 Ir. Ch. R. 121, 132; *Millar* v. *Taylor* (1769), 4 Burr. 2303, 2417.

(*d*) *Macmillan* v. *Dent*, [1907] 1 Ch. 107, 117; *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815.

publication of the lecture (*e*). It has also been held that a drama or musical work is not published by being publicly performed in a theatre or concert room, since the communication is limited to those who have paid the price of admission, and that such persons are admitted under an implied contract that they will not make any use of what they hear except for their own entertainment or instruction (*f*). The distribution of copies of a work to a limited class, such as the friends of the author or the subscribers to some club or society, is not a publication (*g*). Neither is there a publication if each individual member of the public to whom the work is delivered undertakes expressly or impliedly not to publish, but to keep the work for his own private use only (*h*).

The International Copyright Act, 1844, s. 19, provides that the author of any work first published out of the British dominions shall have no copyright or performing right otherwise than such as he may be entitled to under the International Copyright Acts. Under this provision it has been held that an otherwise unpublished play which was first performed outside the British dominions was "first published" out of the British dominions within the meaning of the section and that the performing right in this country was lost (*i*). These decisions, however, do not appear to affect the question as to whether public performance of a play does or does not divest the common law right.

Investitive publication depends on the terms of the different statutes. A literary work must be published in the form of a book as defined by the Copyright Act, 1842 (*k*). Engravings and sculpture acquire copyright upon publication, provided the name of the author and date is placed upon every copy published (*l*). Paintings, drawings and photographs acquire statutory copyright although unpublished (*m*). It is still a moot point whether or not public performance of a play or music is a condition precedent to statutory performing right. Probably it is not, and such rights run from first composition of the play or music and are independent of publication or public performance (*n*).

(*e*) *Abernethy* v. *Hutchinson* (1825), 3 L. J. (O. S.) Ch. 309; *Caird* v. *Sime* (1887), 12 A. C. 326; *Nicols* v. *Pitman* (1884), 26 Ch. D. 374.

(*f*) *Macklin* v. *Richardson* (1770), Amb. 694; *D'Almaine* v. *Boosey* (1835), 1 Y. & C. Ex. 288, 299. But see *Boucicault* v. *Chatterton* (1876), 5 Ch. D. 267.

(*g*) *Kenrick* v. *Dunube Collieries* (1891), 39 W. R. 473; *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652.

(*h*) *Exchange Telegraph* v. *Gregory*, [1896] 1 Q. B. 147; *Exchange Telegraph* v. *Central News*, [1897] 2 Ch. 48.

(*i*) *Boucicault* v. *Chatterton* (1876), 5 Ch. D. 267; *Boucicault* v. *Delafield* (1863), 1 H. & M. 597.

(*k*) 5 & 6 Vict. c. 45, ss. 2, 3.

(*l*) 8 Geo. II. c. 13, s. 1; 54 Geo. III. c. 56, s. 1.

(*m*) *Mansell* v. *Valley Printing Co.*, [1908] 2 Ch. 441.

(*n*) *Hardacre* v. *Armstrong* (1905), 21 T. L. R. 189; *Reichardt* v. *Saptr*, [1893] 2 Q. B. 308.

§ 2 (1). Infringement of copyright.

2.—(1) Copyright (*o*) in a work shall be deemed to be infringed by any person who, without the consent (*p*) of the owner (*q*) of the copyright, does anything the sole right to do which is by this Act conferred on the owner of the copyright (*o*): Provided that the following acts shall not constitute an infringement of copyright:—

(i) Any fair dealing with any work for the purposes of private study, research, criticism, review, or newspaper summary (*r*):

Any invasion of the statutory monopoly.

The three monopolies conferred by the Act are—

(1) The right to produce or reproduce in material form;
(2) The right to perform;
(3) In the case of an unpublished work the right to publish.

Acts done by servants or agents.

The existing Copyright Acts enact that it shall be an infringement to do or cause to be done the acts in respect of which the monopoly is conferred. Instead of this the new Act makes it a part of the monopoly "to authorise any such acts as aforesaid." It is doubtful whether the alteration in the wording makes any substantial difference. It was held, under the existing Acts, that a person did not cause a printing or performance, as the case might be, unless he did it by his servant or agent (*s*). A person is responsible for the acts of those in his service, provided they are acting in the course of their employment. He is not, however, responsible for the acts of an indepen-

(*o*) Sect. 1 (2).
(*p*) Sect. 5 (2).
(*q*) Sect. 5.
(*r*) See also sect. 2 (1) (v and sect. 20.
(*s*) *Lyon* v. *Knowles* (1863), 3 B. & S. 556; *Russell* v. *Briant* (1849), 8 C. B. 836; *Karno* v. *Pathé Frères* (1909), 100 L. T. 260; *Newmark* v. *National Phonograph Co.* (1907), 23 T. L. R. 439; *Kelly's Directories* v. *Garin and Lloyds*, [1901] 1 Ch. 374.

dent contractor whom he commissions to execute work for him, unless he expressly or impliedly authorises him to commit the infringement. Thus, where a company ordered a poster to be prepared as an advertisement of a forthcoming exhibition and merely gave general directions to the artist as to the scheme and subject-matter, and the artist, without their knowledge or authority, infringed the copyright in a photograph, it was held that the company had not caused or procured the infringement (*t*). It is submitted that, under the new Act, a man is still liable for the acts of his servants and agents; in the case of his servants, whether he has or has not authorised the infringement; in the case of other agents, then only if he has authorised the wrongful appropriation. § 2 (1) (i).

The protection granted under the general definition of copyright in sect. 1 is so absolutely prohibitive of any use in the nature of a reproduction of the whole or any part of the author's work, that it is necessary to introduce the exceptions specified in sub-section (i). It would hardly have been safe to have left it entirely to the Court to say what exceptions should or should not be admitted upon the analogy of the case law decided under the Copyright Act, 1842.

Five classes of user are specified under sub-section (i) as being in the public domain, provided such user does not exceed the limits of fair dealing. Probably, the limits of fair dealing are exceeded whenever the user is such that it must naturally compete with and injure the sale of the original work. "Fair dealing."

The express recognition of the right to use a work for the purpose of private study is new. The making of digests, abridgments, and possibly translations of a whole work will be permissible for the purpose of private study. Likewise, the making of a complete copy of a work of art. So long as a work is utilised in this manner, solely for the personal instruction of the person so utilising it, it would, undoubtedly, be a fair dealing. More difficult questions may arise where copies of a digest, abridgment or translation of a work are multiplied for the use of classes and societies. It may be said that such copies are made for "private study," and the question will be "Private study."

(*t*) *Bolton* v. *London Exhibitions* (1898), 14 T. L. R. 550.

§ 2 (1) (i). whether the act complained of goes beyond the limits of fair dealing for that purpose. The test will be whether there is a probability of substantial commercial injury being done to the copyright work.

"Research." User for the purpose of research must carry with it the right to publish the fruits of such research. The liberty of fair dealing by way of research is probably intended to express the whole of the existing case law on the meaning of fair use.

"Criticism or review." Fair dealing for the purposes of criticism or review has always been deemed to be permissible. The decisions upon the existing law will be equally applicable upon any question under the new law as to what may or may not be reproduced under the cloak of criticism.

"Newspaper summary." The right of newspaper summary is a new right. It apparently permits an epitome, with reasonable verbatim extracts, from the work summarised. The whole object of the summary may be the reproduction of the kernel or pith of the matter summarised. It need not be accompanied by any comment or criticism. It must, however, be fair dealing. Probably the best test of fair dealing is to ascertain whether the summary is such that, having regard to the character and circulation of the work summarised and the newspaper respectively, there is any probability of substantial commercial injury being done to the copyright work.

"Fair use" of unpublished works. It will be observed that the liberty given by paragraph (i) applies to all works published or unpublished. It is essential that the right should not be confined to published works, for otherwise a criticism or newspaper summary of a play publicly performed, but not published, might be held to be an infringement. As regards unpublished documents and papers, although the sub-section would appear to apply to all such matters so as to prevent the publication of an unauthorised review or newspaper summary being an infringement of copyright, yet such review or summary could usually be stopped on the ground that the publication was procured by a breach of trust or confidence. There is no doubt, however, that the right of stopping or punishing such unauthorised publication of the contents of confidential documents is considerably weakened by the abrogation of the old common law right of property therein, and the substitution of the modified protection given by the new Act.

§ 2 (1) (i).

Existing law.—Reasonable extracts may be taken for the purpose of criticism (*u*). The extracts must, however, be taken *bonâ fide* for the purpose of criticism, and not for the purpose of enhancing the value of the copyist's work by reproducing the plums from the original work (*x*).

The following is the definition of "fair use" given by Stephen, J., in the Digest of Copyright Law which he prepared for the Copyright Commission in 1878.

"The only use which an author can lawfully make of a prior copyright work on the same subject is—

(i) Using the information or the ideas contained in it without copying its words, or imitating them, so as to produce what is substantially a copy (*y*).

(ii) Making extracts (even if they are not acknowledged as such) appearing under all the circumstances of the case reasonable in quality, number, and length, regard being had to the objects for which the extracts are made, and to the subjects to which they relate.

(iii) Using one book on a given subject as a guide to authorities afterwards independently consulted by the author of another book on the same subject.

(iv) Using one book on a given subject for the purpose of checking the results independently arrived at by the author of another book on the same subject."

Directories and statistics.

In the case of directories, compilations of statistics and similar works which are the result of more or less mechanical labour, a subsequent compiler has no right to take the results of the labour and expense incurred by another for the purposes of a rival publication (*z*). The compiler of a directory cannot simply cut the slips from another copyright directory, and having verified them by a house-to-house canvass, insert in his own directory the corrected slips (*a*).

(*u*) *Mawman* v. *Tegg* (1826), 2 Russ. 385, 393; *Black* v. *Murray* (1870), 9 M. 341, 356; *Whittingham* v. *Wooler* (1817), 2 Swanst. 428; *Wilkins* v. *Aikin* (1810), 17 Ves. 422; *Bell* v. *Whitehead* (1839), 8 L. J. Ch. 141.

(*x*) *Roworth* v. *Wilkes* (1807), 1 Camp. 94, 97; *Campbell* v. *Scott* (1842), 11 Sim. 31; *Smith* v. *Chatto* (1874), 31 L. T. 775.

(*y*) *Sayer* v. *Moore* (1785), 1 East, 361, n.; *Hogg* v. *Kirby* (1803), 8 Ves. 215; *Matthewson* v. *Stockdale* (1806), 12 Ves. 270; *Mawman* v. *Tegg* (1826), 2 Russ. 385; *Pike* v. *Nicholas* (1869), L. R. 5 Ch. 251; *Alexander* v. *Mackenzie* (1847), 9 D. 748, 761; *Longman* v. *Winchester* (1809), 16 Ves. 269; *Wilkins* v. *Aikin* (1810), 17 Ves. 422; *Weekes* v. *Williamson* (1886), 12 Vict. L. R. 483; *Wilson* v. *Lake* (1875), 1 Vict. L. R. Eq. 127; *Lamb* v. *Evans*, [1893] 1 Ch. 218, 224.

(*z*) *Longman* v. *Winchester* (1809), 16 Ves. 269; *Matthewson* v. *Stockdale* (1806), 1 J. & H. 312; *Baily* v. *Taylor* (1829), 1 Russ. & M. 73; *Wilkins* v. *Aikin* (1810), 17 Ves. 422, 424; *Lewis* v. *Fullarton* (1839), 2 Beav. 6, 8; *Jarrold* v. *Houlston* (1857), 3 K. & J. 708, 715; *Hotten* v. *Arthur* (1863), 1 H. & M. 603; *Kelly* v. *Morris* (1866), L. R. 1 Eq. 697; *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444; *Scott* v. *Stanford* (1867), L. R. 3 Eq. 718; *Garland* v. *Gemmill* (1887), 14 Can. S. C. 321.

(*a*) *Morris* v. *Ashbee* (1868), L. R. 7 Eq. 34; *Morris* v. *Wright* (1870), L. R. 5 Ch. 279.

§ 2 (1) (i). EXISTING LAW.

The taking of an author's selection and arrangement of material is an infringement, even although there is no appropriation of that author's actual collocation of words or sentences (*b*). When one author gives quotations and selections from non-copyright works, it is an infringement if another author appropriates those quotations and selections for his own book. He may go to the original sources indicated by the first author, but, having done so, must make his own selection and arrangement of quotations (*c*).

Taking selection and arrangement of material.

Identical result from original sources.

It is no excuse for piracy to say that with a little labour the copyist could have produced identically the same result. The fact that the result may be identical is a reason for not making a new book, but it is no reason for copying another's book (*d*).

Work with different aim and object.

Much more latitude is allowed to an author who is compiling a book which is in no sense a rival of the prior publication which he desires to make use of. Assistance may be fairly taken if the object is to produce a work of an entirely different character and scope, although the same assistance would be unfair and amount to an infringement if the object had been to produce a rival work upon the same lines (*e*). The fact, however, that one work has a different aim and object from another does not justify a wholesale appropriation of material from the prior publication (*f*). A copyright owner is entitled to protection not only against piracy which may injure the existing market for his work, but also against piracy which may injure its potential value as a basis for other derivative works (*g*).

Use of law reports.

The reprinting of reports of decided cases from a series of copyright reports will constitute an infringement notwithstanding that they are taken in order to form, along with numerous other reports, a collection of the decisions upon some particular branch of the law, such as "Poor Law" or "Registration of Voters" (*h*).

Law digests.

A law digest compiled by taking verbatim the head notes from copyright law reports and arranging them under appropriate titles is an infringement of the copyright in such law reports (*i*).

No custom of piracy among newspapers.

The proprietors of newspapers and magazines have no greater right of appropriating copyright material than any other persons (*k*). In one case it was alleged that the custom of the newspaper trade

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(*b*) *Spiers* v. *Brown* (1858), 31 L. T. (O. S.) 18; 6 W. R. 352; *Moffat & Paige* v. *Gill & Sons* (1902), 86 L. T. 465; *Lamb* v. *Evans*, [1893] 1 Ch. 218, 222; *Macmillan* v. *Suresh Chunder Deb* (1890), Ind. L. R. 17 Calc. 951.

(*c*) *Pike* v. *Nicholas* (1869), L. R. 5 Ch. 251.

(*d*) *Matthewson* v. *Stockdale* (1806), 1 J. & H. 312; *Walter* v. *Lane*, [1900] A. C. 539; *Kelly* v. *Morris* (1866), L. R. 1 Eq. 697; *Morris* v. *Wright* (1870), L. R. 5 Ch. 279; *Baily* v. *Taylor* (1829), 1 Russ. & M. 73.

(*e*) *Wilkins* v. *Aikin* (1810), 17 Ves. 422; *Bradbury* v. *Hotten* (1872), L. R. 8 Ex. 1, 5; *Bacorth* v. *Wilkes* (1807), 1 Camp. 94; *Murray* v. *M'Farquhar* (1785), M. Dict. 8309.

(*f*) *Nicols* v. *Pitman* (1884), 26 Ch. D. 374.

(*g*) *Weatherby & Sons* v. *International Horse Agency*, [1910] 2 Ch. 297.

(*h*) *Sweet* v. *Shaw* (1839), 3 Jur. 217; *Hodges* v. *Welsh* (1840), 2 Ir. Eq. R. 266. See *Saunders* v. *Smith* (1838), 3 Myl. & Cr. 711.

(*i*) *Sweet* v. *Benning* (1855), 16 C. B. 459.

(*k*) *Maxwell* v. *Somerton* (1874), 22 W. R. 313; *Wyatt* v. *Barnard* (1814), 3 V. & B. 77.

permitted the appropriation of paragraphs of news by one newspaper from another provided (1) the source was acknowledged, (2) the papers were not direct rivals, (3) there was give and take between the papers, and (4) no expressed objection. It was held that there was no custom which permitted such appropriation (*l*). § 2 (1) (i). EXISTING LAW.

In some of the earlier cases it was deemed to be admissible in the interests of science and knowledge to appropriate the work of another provided that it was rendered more useful by correction and addition (*m*). In one case, Shadwell, V.-C., went as far as to say that a person might copy and publish the whole of a literary composition, provided he wrote notes upon it and presented it to the public connected with matter of his own (*n*). Gradually, however, the Courts came to look more to the interests of the author than to those of the public, and in none of the later cases is addition, correction or improvement regarded as a legitimate excuse for making a substantial appropriation from any copyright work (*o*). Piracy not excused by reason of improvements and additions.

The same principle which justified the taking of another's work, provided that it was improved or added to, was also held to justify what were called "fair abridgments" (*p*). The abridgment was permitted on the ground that it assisted in the diffusion of knowledge and so was a benefit to mankind. The right of publishing an abridgment is, however, inconsistent with the principle of many modern decisions, and it is doubtful whether any abridgment would now be permitted (*q*). Abridgments.

Multiplication of copies is an infringement of copyright under the Act of 1842, even although the copies are made for private use or gratuitous distribution (*r*). Copies made for private use.

(ii) Where the author (*s*) of an artistic work (*t*) is not the owner of the copyright therein, § 2 (1) (ii).

(*l*) *Walter* v. *Steinkopff*, [1892] 3 Ch. 489.

(*m*) *Sayer* v. *Moore* (1785), 1 East, 361, n.; *Cary* v. *Kearsley* (1802), 4 Esp. 168; *Carnan* v. *Bowyer* (1786), 1 Cox, Eq. Cas. 283.

(*n*) *Martin* v. *Wright* (1833), 6 Sim. 297.

(*o*) *D'Almaine* v. *Boosey* (1835), 1 Y. & C. Ex. 288; *Warne* v. *Seebohm* (1888), 39 Ch. D. 73; *Oxford & Cambridge* v. *Gill* (1899), 43 S. J. 570; *Jarrold* v. *Houlston* (1857), 3 K. & J. 708; *Kelly* v. *Morris* (1868), L. R. 1 Eq. 697; *Scott* v. *Stanford* (1867), L. R. 3 Eq. 718.

(*p*) *Gyles* v. *Wilcox* (1740), 2 Atk. 142; *Tonson* v. *Walker* (1752), 2 Swans. 672, 682; *Millar* v. *Taylor* (1769), 4 Burr. 2303, 2311; *Bell* v. *Walker* (1785), 1 Bro. C. C. 450; *Murray* v. *Elliston* (1822), 1 Dow & Ry. 299; *Butterworth* v. *Robinson* (1801), 5 Ves. 709; *Dodsley* v. *Kinnersley* (1761), Amb. 402; *Anonymous Case* (1774), Lofft, 775; *D'Almaine* v. *Boosey* (1835), 1 Y. & C. Ex. 288.

(*q*) *Dickens* v. *Lee* (1844), 8 Jur. 183, 184; *Tinsley* v. *Lacy* (1863), 1 H. & M. 747, 754; *Spiers* v. *Brown* (1858), 6 W. R. 352.

(*r*) *Alexander* v. *Mackenzie* (1847), 9 D. 748; *Hotten* v. *Arthur* (1863), 1 H. & M. 603; *Novello* v. *Sudlow* (1852), 12 C. B. 177; *Ager* v. *The P. & O.* (1884), 26 Ch. D. 637.

(*s*) Sects. 16 (2), 21.

(*t*) Sect. 35 (1) ("Artistic work").

§ 2 (1) (ii

the use by the author of any mould, cast, sketch, plan, model, or study made by him for the purpose of the work, provided that he does not thereby repeat or imitate the main design of that work:

Artist's use of models and studies, &c.

Some provision of this kind is essential in order to protect an artist who has sold the copyright in a finished work and wishes to make use of some of the preliminary matter in the preparation of a new work. It will not be easy to determine when the use of a sketch has been such that the main design of the first work has been repeated or imitated. In the case of a painting of a historic group, such as the coronation ceremony in Westminster Abbey, the artist might use his studies of the individuals represented so as to produce separate portraits of such individuals. He might even reproduce line for line the central figures of the King and Queen. It is submitted that he would not be repeating or imitating the main design of such a picture unless he reproduced substantially the entire group of the principal characters taking part in the ceremony.

Existing law.—The above sub-section marks a distinct alteration in the law; although it is difficult to say how far the use of preliminary material is under existing law an infringement of the copyright in a completed work. It seems clear that a painter might use and re-use all his models and studio furnishings with impunity, but the use of preliminary sketches is probably more restricted. If he reproduced such a sketch in a second picture, and thus reproduced in effect a replica of any substantial part of the first picture or the design thereof, he would probably infringe the copyright. In the case supposed of a coronation group, he could probably be restrained from using the sketches of any of the principal figures in order to produce separate portraits of the individuals.

§ 2 (1) (iii).

(iii) The making or publishing (*u*) of paintings, drawings, engravings (*x*), or photographs (*y*) of a work of sculpture (*z*) or

(*u*) Sect. 1 (3).
(*x*) Sect. 35 (1) ("Engravings").
(*y*) Sect. 35 (1) ("Photograph").
(*z*) Sect. 35 (1 ("Work of sculpture").

artistic craftsmanship, if permanently situate in a public place or building, or the making or publishing of paintings, drawings, engravings, or photographs (which are not in the nature of architectural drawings or plans) of any architectural work of art (*a*): § 2 (1) (iii).

"Public place or building."

The Act contains no definition of "public" in relation to a place or building. A public place or building may mean a place or building to which the public generally have a right of access, such as the National Gallery or British Museum, or it may mean a place to which members of the public as such are habitually admitted upon payment or otherwise, such as a theatre, music hall, or cemetery. Probably the liberty of copying is limited to places or buildings to which the public, or some section of them, such as the parishioners in a parish, or the burgesses of a city, have either by statute, common law, or under the terms of some trust deed, an actual legal right of entry. A place or building to which the public are admitted merely by licence of the proprietor for the time being of such place or building, such as a theatre, is not, properly speaking, a public place or building.

(iv) The publication in a collection, mainly composed of non-copyright matter, bonâ fide intended for the use of schools, and so described in the title and in any advertisements issued by the publisher, of short passages from published (*b*) literary works (*c*) not themselves published for the use of schools in which copyright subsists: Provided that not more than two § 2 (1) (iv).

(*a*) Sect. 35 (1) ("Architectural work of art").
(*b*) Sects. 1 (3), 35 (2).
(*c*) Sect. 35 (1) ("Literary work").

§ 2 (1) (iv). of such passages from works by the same author are published by the same publisher within five years, and that the source from which such passages are taken is acknowledged:

Paragraph (iv) expressly authorised by Berlin Convention.

The Berlin Convention, Article 10 (following the Berne Convention, Article 8), states that, as regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational purposes, or having a scientific character, or for chrestomathies, the legislature of each country is free to make such provision as it may think proper.

The above paragraph gives a very limited and carefully guarded liberty of taking extracts from published literary works for educational purposes only.

Question whether it applies to musical or dramatic work,

It is submitted that, for the purpose of this paragraph, literary work must be distinguished from dramatic work and musical work, and that there is no liberty of taking extracts from musical works or from literary works published in dramatic form. Upon this point a parallel case under the American Copyright Acts may be referred to, where it has been held that neither a "dramatic composition" nor a "musical composition," although printed and published, is a "book" within the meaning of the manufacturing clause requiring type to be set in the United States (*d*).

or to maps or charts.

Literary work is defined in the Act as including maps, charts, plans, tables and compilations (*e*). It is very doubtful whether any of these fall within the privilege granted by this paragraph. One does not take a "passage" from a map, and the word is hardly appropriate even to an extract from a "table" or similar "compilation."

Consequence of failure to comply with the requirements of the Act.

Apparently, if there is a failure to comply with the section in any particular, the extracted portion will immediately become an infringing copy, and the usual consequences will follow. Thus, if the publisher issued any

(*d*) *Herrick* v. *J. S. Ogilvie Publishing Co.* (1909), Cop. Cas. 1905-10, p. 262; *Oliver* v. *Littleton* (1895), 67 Fed. Rep. 905.

(*e*) Sect. 35 (1) ("Literary work").

one advertisement in which the book was not described as intended for the use of schools, the owner of any copyright work from which any passage had been taken would be entitled to an injunction, delivery up of copies, and damages. The copies having become infringing copies, and consequently the property of the owner of the copyright, would not again become lawful copies by subsequent compliance with the terms of the sub-section. § 2 (1) (iv).

(v) The publication in a newspaper of a report of a lecture (*f*) delivered in public (*g*), unless the report is prohibited by conspicuous written or printed notice affixed before and maintained during the lecture at or about the main entrance of the building in which the lecture is given, and, except whilst the building is being used for public worship, in a position near the lecturer; but nothing in this paragraph shall affect the provisions in paragraph (i) as to newspaper summaries: § 2 (1) (v).

There is no liberty of dealing with a lecture under this paragraph unless it is delivered in public. Lectures, therefore, which are delivered by a professor in a university (*h*), or a lecturer in a college, such as the Working Men's College (*i*), cannot be reported without the consent of the lecturer. A lecture is delivered in public where members of the public are admitted as such. A lecturer may deliver a lecture to an audience each member of which, although coming as one of the general public, Privilege does not apply to University or other lectures not delivered in public.

(*f*) Sect. 35 (1) ("Lecture").
(*g*) Sect. 35 (2).
(*h*) *Caird* v. *Sime* (1887), 12 A. C. 326; *Abernethy* v. *Hutchinson* (1825), 3 L. J. (O. S.) Ch. 209.
(*i*) *Nicols* v. *Pitman* (1884), 26 Ch. D. 374. See also *Duck* v. *Bates* (1884), 13 Q. B. D. 843; *Glenville* v. *Selig Polyscope Co.* (1911), The Times, July 20.

§ 2 (1) (v). is only admitted upon the express terms that he will not report or sanction any report of the lecture. It is submitted that where there is a bargain of this kind between the lecturer and each one of his audience, the lecture is not delivered in public (*k*). The existence, however, of such a bargain may depend upon whether the terms of admission printed on a ticket of admission or otherwise have been brought with sufficient clearness to the notice of each member of the audience.

Question whether right of newspaper summary applies to University lecture.

It has already been observed that the right of newspaper summary under paragraph (i) applies whether the work summarised is published or unpublished. Where, however, the lecture is not delivered in public, it is delivered on the implied terms between the lecturer and his audience that they come for their own instruction and amusement only, and therefore publication even of a newspaper summary could be restrained on the ground that the publication was procured by breach of faith or confidence (*l*).

What is a newspaper?

When a lecture is delivered in public, the right to report or summarise is confined to newspapers. The Act contains no definition of newspaper. A newspaper is defined in certain other statutes (1) for the purposes of the law of libel, (2) for the purposes of the Post Office regulations. In the Newspaper Libel and Registration Act, 1881 (*m*), a newspaper means "any paper containing public news, intelligence or occurrences, or any remarks or observations therein printed for sale and published in England or Ireland periodically, or in parts or numbers at intervals not exceeding twenty-six days between the publication of any two such papers, parts or numbers." In the Post Office Act, 1908 (*n*), a newspaper is defined as "any publication consisting wholly or in great part of political or other news, or of articles relating thereto or to other current topics with or without advertisements . . . . published in numbers at intervals of not more than seven days." The definition last above cited, without the final limitation as to the intervals of pub-

(*k*) *Macklin* v. *Richardson* (1770), Amb. 694.
(*l*) *Caird* v. *Sime* (1887), 12 A. C. 326; *Abernethy* v. *Hutchinson* (1825), 3 L. J. (O. S.) Ch. 209.
(*m*) 44 & 45 Vict. c. 60, s. 1.
(*n*) 8 Edw. VII. c. 48, s. 20.

lication, probably gives a very fair definition of newspaper in the popular sense, and in the absence of an express definition might very properly be applied in the construction of this Act. As there is no statutory restriction on the interval which may elapse between the publication of each number or part, it is clear that monthly journals might come within the meaning of newspaper, provided their contents consisted wholly or in great part of news, current topics and articles relating thereto. Monthly and quarterly reviews, scientific magazines, and legal and medical journals might all fall within the definition of a newspaper. **§ 2 (1) (v).**

Summary of newspaper rights in respect of a lecture.

The right of a newspaper in respect of a lecture delivered in public is:—

(1) To print a fair summary;

(2) To print reasonable extracts for the purpose of criticism;

(3) To print a verbatim report, unless such report is prohibited by the prescribed notice.

If the lecture deals with political matters, it may fall under the heading of "an address of a political nature," and may, therefore, be reported verbatim in any newspaper, notwithstanding any attempted prohibition by notice (*nn*).

Lectures at common law and under the Lectures Copyright Act, 1835.

Existing law.—So long as a lecture remains unpublished either by printing or delivery in public, there is a common law right under which all reproduction can be prohibited (*o*). Before the Lectures Copyright Act, 1835 (*p*), there was no protection for a lecture which had lost the common law right by being delivered in public, but which had not acquired copyright under the Copyright Act of Anne by publication as a book. The Lectures Copyright Act, 1835, was passed to remedy this defect, and it provided that if the prescribed notice should be given to two justices of the peace before the delivery of a lecture in public, then the author should retain the sole right of first publication. This right, like the common law right in an unpublished work, was perpetual, or until such time as the author or his representative should authorise the lecture to be printed or published, and so acquire copyright in it as a book.

All lectures, sermons and speeches delivered in public without any express or implied condition attached to the right of admission, must be treated as having been published in the sense that no common law right could be asserted on the part of the author or

(*nn*) Sect. 20.
(*o*) *Caird* v. *Sime* (1887), 12 A. C. 326.
(*p*) 5 & 6 Will. 4, c. 65.

§ 2 (1) (v). EXISTING LAW.

his representatives (*q*). Except therefore in the rare cases where the provisions of the Lectures Copyright Act were observed, such works have become absolutely free in so far as the right of the author of the lecture, speech, or sermon is concerned.

When the lectures, sermons, or speeches were not delivered in public, but to a limited audience drawn from a limited class of the public, or were otherwise delivered under such circumstances as would imply a confidential relationship between speaker and audience, such as university or college lectures, then there is no publication and the common law right of property in the lecture, sermon, or speech remains intact (*q*).

Whether or not the speaker retained or abandoned his right of property in the words spoken, if they were in fact reported without objection on the part of the speaker and published, the reporter acquired an independent copyright in the report as the author of a book (*r*).

§ 2 (1) (vi).

(vi) The reading or recitation in public by one person of any reasonable extract from any published work (*s*).

Scope of the privilege.

The question whether an extract is reasonable or not must probably be decided with regard to the possible injury to the commercial value of the work utilised. Where the work is not primarily adapted for public reading or recitation, no doubt large extracts may be permitted, but where a work is such that part of the fruits which the author may reasonably expect to gather are the proceeds of public performance, delivery, reading, or recitation, then only a comparatively small extract would be reasonable.

But for this paragraph the reading or recitation in public of any extract from a literary work would be an infringement of the sole right of public performance, which includes the sole right of acoustic representation. The paragraph applies to any published work, and therefore to dramatic works. There is nothing in the paragraph which expressly permits or prohibits recitation in character costume. It is doubtful, however, whether this would not be deemed to be more than a recitation. It

(*q*) *Caird* v. *Sime* (1887), 12 A. C. 326; *Walter* v. *Lane*, [1900] A. C. 539; *Macklin* v. *Richardson* (1770), Amb. 694; *D'Almaine* v. *Boosey* (1835), 1 Y. & C. 268.

(*r*) *Walter* v. *Lane*, [1900] A. C. 539.

(*s*) Sects. 1 (3), 35 (2).

would, *primâ facie*, infringe the sole right of visual representation of the dramatic action in the work, and being more than a bare reading or recitation, would probably not be within the privilege granted by the paragraph. It may be noted that in sect. 11 (2), which makes an unauthorised public performance an offence punishable on summary conviction, there is no saving clause which excludes from its operation a reading or recitation by one person of a reasonable extract, and the question arises whether the Court would not be bound to convict such a performer, although he could not be proceeded against in a civil action. § 2 (1) (vi).

Existing law.—The exclusive right of reading or recitation is vested in the author for the first time as part of the right of performance. Under the existing statutes there is no such exclusive right in any literary work. Even lectures, pieces for recitation and dramatic works are unprotected from public reading or recitation.

(2) Copyright (*t*) in a work shall also be deemed to be infringed by any person who— § 2 (2).

(a) sells or lets for hire, or by way of trade exposes or offers for sale or hire; or

(b) distributes either for the purposes of trade or to such an extent as to affect prejudicially the owner (*u*) of the copyright; or

(c) by way of trade exhibits in public; or

(d) imports for sale or hire into any part of His Majesty's dominions to which this Act extends (*x*),

any work which to his knowledge infringes (*y*) copyright or would infringe copyright if it had been made within the part of His Majesty's dominions in or into which the sale or hiring,

(*t*) Sect. 1 (2).
(*u*) Sect. 5.
(*x*) Sects. 25 (1), 26 (1), 27, 28, 35 (1) ("Self-governing dominion").
(*y*) Sect. 2 (1).

§ 2 (2). exposure, offering for sale or hire, distribution, exhibition, or importation took place.

Knowledge of infringement essential.

Whereas sect. 2 (1) deals with those acts which are direct infringements of the monopoly conferred by sect. 1, sect. 2 (2) specifies those acts which, although not a direct infringement of the monopoly, yet follow from and aggravate the consequences of such a trespass. The first class of acts are (subject to the provisions of sect. 7) actionable whether committed with or without knowledge of the wrong. The second class of acts are not actionable at all unless committed with knowledge.

Sale, &c. abroad.

In each case the act complained of must be proved to have been completed within the territorial limits of the Act (*z*).

"Offers for sale."

Where a dealer did not stock a certain picture, nor include it in his price list, but was invited to quote a price, and accordingly did so, and expressed his willingness to negotiate a sale, it was held that he had not offered the picture for sale within the meaning of the Fine Arts Act, 1862 (*a*).

Proceedings under sections 7 and 14 (1) do not require proof of knowledge.

Beside the provisions in sect. 2, which cover all infringements, the Act contains certain other provisions which relate to "copies" and "infringing copies." These are, sect. 14 (1), which relates to copies of any work made out of the United Kingdom, and prohibits their importation into the United Kingdom if the prescribed notice has been given to the Customs; and sect. 7, which provides that all infringing copies of any work, or of any substantial part thereof, shall be deemed to be the property of the owner of the copyright, and that damages may be recovered in respect of the conversion thereof. Infringing copy means any copy including any colourable imitation made or imported in contravention of any of the provisions of the Act. The Act contains no definition of "copy": but if it is given a liberal interpretation, sect. 7 ought to prove most valuable in cases where it would be otherwise difficult to recover damages, owing to the absence of proof of knowledge.

(*z*) *Badische Anilin* v. *Hickson*, [1905] 2 Ch. 495; *Saccharin Corporation* v. *Reitmayer*, [1900] 2 Ch. 659.

(*a*) *Wolff* v. *Wood* (1903), Cop. Cas. 1901-4, p. 69; The Times, October 31.

§ 2 (2).

Summary proceedings.

In addition to the above-mentioned civil remedies for infringement, sects. 11 to 13 contain provisions for the seizure and destruction of infringing copies, and the punishment of offenders by fine upon summary conviction.

Existing law.—The existing law in relation to acts constituting infringement, and the consequent right of the proprietor of the copyright to recover damages in respect thereof, is very vague and ill defined.

The effect of the statutes as interpreted by case law is probably as follows:—

It is an infringement of copyright in the case of—

(1) Books—

(a) To multiply copies of the whole or any substantial part (*b*).

(b) To import for sale or hire any work which infringes copyright under (a) (*c*).

(c) To import for sale or hire a foreign reprint (that is to say, a copy made outside the British Dominions) (*d*).

(d) To import into the United Kingdom copies printed in Canada of any book which has been copyrighted under the Canada Copyright Act (*e*).

(e) Knowing a book to have been unlawfully made or imported, to sell, publish, or expose the same for sale or hire, or to possess it for sale or hire (*f*).

Further, all works unlawfully printed or imported are deemed to be the property of the proprietor of the copyright, and after making a demand in writing he may recover the same from any person who has them in his possession, or if he has had them and sold them, damages for conversion. This provision, which is contained in sect. 23 of the Copyright Act, 1842, has been held to apply to infringements where part only of a work is copied and embodied as part of another work (*g*), and if this decision is correct the limitations as to knowledge in the case of (d) are in effect removed, and the proprietor of the copyright can sue any person for damages who has sold infringements, whether with or without knowledge. By reason of this provision it is also an actionable wrong to distribute infringing copies, although done innocently and gratuitously.

It is an infringement of copyright in the case of—

(2) Paintings, drawings and photographs (*h*)—

(a) To make any copy of the work or of any part thereof for sale, hire, or distribution.

(b) To import or sell, publish, let to hire, exhibit or distribute or offer for sale, hire or exhibition, or distribution any copy of the work or of any part thereof made without the consent of the proprietor of the copyright.

(*b*) Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 2, 15.
(*c*) Sect. 15.
(*d*) Sect. 17.
(*e*) Canada Copyright Act, 1875 (38 & 39 Vict. c. 53), s. 4.
(*f*) Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 15, 17.
(*g*) *Boosey* v. *Wright* (No. 2) (1899), 81 L. T. 265.
(*h*) Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), ss. 6, 11.

§ 2 (2). EXISTING LAW.

Further, in the case of offences specified under (a), and, if the offence has been committed with knowledge of infringement, in the case of offences specified under (b) the proprietor of the copyright can, in a civil action, recover penalties in addition to damages.

It is an infringement of copyright in the case of—

(3) Engravings (*i*)—

(a) To make any copy of the work or of any part thereof.

(b) To import any copy of the work or of any part thereof for sale.

(c) To publish, sell, or expose for sale, or otherwise dispose of any work unlawfully made or imported.

(4) Sculpture (*k*)—

(a) To make any copy of the work or of any part thereof.

(b) To import any work which has been unlawfully made.

(c) To expose for sale or otherwise dispose of any work which has been unlawfully made.

§ 2 (3).

(3) Copyright (*l*) in a work shall also be deemed to be infringed by any person who for his private profit permits a theatre or other place of entertainment to be used for the performance (*m*) in public of the work without the consent (*n*) of the owner of the copyright (*o*), unless he was not aware, and had no reasonable ground for suspecting, that the performance would be an infringement of copyright.

Liability of lessee, &c. of theatre, knowledge presumed.

This sub-section, with regard to performing rights, is the equivalent of sub-sect. 2 with regard to the right of reproduction in material form, that is to say, it specifies the acts which, although not a direct invasion of the author's monopoly, are accessory to such invasion, and therefore to be deemed infringements. Here, again, the innocent offender is to be excused, but in this case the onus of proof is shifted, and the offender has to prove that he was not aware, and had no reasonable ground for sus-

(*i*) Engraving Copyright Act, 1734 (8 Geo. II. c. 13), ss. 1, 2; Prints Copyright Act, 1777 (17 Geo. III. c. 57).

(*k*) Sculpture Copyright Act, 1814 (54 Geo. III. c. 56), s. 3.

(*l*) Sect. 1 (2).

(*m*) Sects. 2 (1) (vi), 35 (1) ("Performance").

(*n*) Sect. 5 (2).

(*o*) Sect. 5.

§ 2 (3).

pecting, that an offence was being committed. This is a very valuable provision for the proprietor of dramatic rights, and will considerably strengthen his hands against the tenant or occupier of premises upon which an unauthorised performance takes place. Under existing law, he had to prove that such person wilfully caused or permitted the unauthorised performance, knowing it to be unauthorised *p*. This was a heavy burden of proof, and the Courts were frequently constrained to hold that knowledge was not proved in cases where the circumstances were undoubtedly suspicious *q*.

Section applicable to recitations, readings and lectures.

It will be observed that the operation of the sub-section is not confined to dramatic and musical works. The right of public performance exists in all works which are capable of being acoustically represented, or which have a dramatic element capable of visual representation. This sub-section appears, therefore, to apply to the unauthorised delivery of a lecture, or to a public reading or recitation, as well as to the performance of dramatic and musical works.

Summary of offences against performing rights.

Reading sub-sect. 2 (1) and 2 (3) together, the offences which are actionable, and in respect of which damages can be recovered, are:—

(1) Performing or causing to be performed;

(2) In the case of a proprietor, tenant or occupier of a theatre or other building, permitting the building to be used for private performance, provided—

(a) he does so for private profit;

(b) he is unable to prove that he was innocent as to the unlawful nature of the performance.

Where lessee, &c. of theatre causes the performance.

If the proprietor, tenant or occupier of a theatre or other building not only permits the performance to take place, but also causes the performance in the sense that the actual performers are his servants or agents (*qq*), then it seems reasonably clear that he may be sued under

(*p*) Copyright (Musical Compositions) Act, 1888, s. 3.

(*q*) *Moul* v. *Coronet Theatre, Limited* (1903), Cop. Cas. 1901-4, p. 42, The Times, February 4; *Sarpy* v. *Holland*, [1908] 2 Ch. 198.

(*qq*) *Lyon* v. *Knowles* (1863), 3 B. & S. 556; *Russell* v. *Briant* (1849), 8 C. B. 836.

§ 2 (3). sect. 2 (1) for a direct infringement of the monopoly of the sole right of performance, and proof of innocence on his part would afford no defence.

No reservation of performing right by printed notice or otherwise is in any case necessary to preserve the full right of public performance.

Existing law.—Performing right exists only in the case of dramatic and musical works. Briefly the law relating to the infringement of such right is as follows:—

(1) Dramatic piece—

(i) a penalty of 40*s.* for each performance may be recovered by the owner of the performing right if the defendant performs or causes the piece to be performed, that is, initiates or directs the performance or performs by himself, his servants or agents (*r*);

(ii) damages may be recovered if the defendant performs or causes or permits to be performed (*s*);

(iii) costs follow the event and are not in the discretion of the Court (*t*);

(2) Musical composition—

The same remedies as in the case of a dramatic piece, but subject to the provisions of the Copyright (Musical Compositions) Act, 1888, that—

(i) the award of the 40*s.* penalty is not obligatory, and the Court may award any less sum, including nominal damages only (*u*);

(ii) the costs are in the absolute discretion of the Court (*x*);

(iii) the proprietor, tenant, or occupier of any theatre or other building where the performance takes place is not liable, unless he wilfully caused or permitted the performance (*y*).

The enjoyment of performing right in musical compositions is also subject to the provisions of the Copyright (Musical Compositions) Act, 1882, under which the printing of a notice of reservation upon each published copy of the music is a condition precedent of the further enjoyment of the performing right therein (*z*).

(*r*) Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15), s. 2.
(*s*) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 20.
(*t*) Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15), s. 2, amended by 5 & 6 Vict. c. 97, s. 2; *Reeve* v. *Gibson*, [1891] 1 Q. B. 652; *Avery* v. *Wood*, [1891] 3 Ch. 115; *Hasker* v. *Wood* (1885), 54 L. J. Q. B. 419.
(*u*) Copyright Musical Compositions) Act, 1888, ss. 1, 4.
(*x*) Sect. 2.
(*y*) Sect. 3.
(*z*) 45 & 46 Vict. c. 40.

§ 3. Term of copyright.

3. The term for which copyright (*a*) shall subsist shall, except as otherwise expressly provided by this Act (*b*), be the life of the author and a period of fifty years after his death:

Provided that at any time after the expiration of twenty-five years, or in the case of a work in which copyright subsists at the passing of this Act thirty years, from the death of the author (*c*) of a published work (*d*), copyright in the work shall not be deemed to be infringed by the reproduction of the work for sale if the person reproducing the work proves that he has given the prescribed notice in writing of his intention to reproduce the work, and that he has paid in the prescribed manner to, or for the benefit of, the owner of the copyright (*e*) royalties in respect of all copies of the work sold by him calculated at the rate of ten per cent. on the price (*f*) at which he publishes the work; and, for the purposes of this proviso, the Board of Trade may make regulations prescribing the mode in which notices are to be given, and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, including (if they think fit) regulations requiring payment in advance or otherwise securing the payment of royalties.

(*a*) Sect. 1 (2).
(*b*) Sects. 16 (1), 17, 18, 19 (1), 21.
(*c*) Sect. 16 (1).
(*d*) Sects. 1 (3), 35 (2).
(*e*) Sect. 5.
(*f*) Cf. sect. 19 (3) ("Ordinary Retail Selling Price").

§ 3.

"Except as otherwise expressly provided."

The following are the special provisions contained in the Act:—

(1) Works of joint authors—fifty years after death of author who dies first, or life of longest liver, whichever period is the longer (*g*);

(2) Any literary, dramatic or musical work, or any engraving not published or performed in public in the lifetime of the author—until publication or performance in public, and fifty years thereafter (*h*);

3. Photographs (*i*), records, perforated rolls, &c. *k*—fifty years from making the negative or plate;

4. Government publications, the copyright in which has, in default of agreement with the author, vested in the Crown *l*—fifty years from the date of first publication.

Proviso.

As originally introduced, the Copyright Bill contained a very complicated clause, under which it was proposed that any person should, after the death of the author of a work which had been published or publicly performed, have the right to present a petition to the Comptroller-General of Patents, Designs and Trade Marks, and obtain an order for a compulsory licence to print or perform the work upon satisfying the Comptroller that, by reason of the excessive price charged for copies of the work, or for the right to perform the work in public, or in any other way, the work was withheld from the public, and the reasonable requirements of the public were not met.

The compulsory licence clause met with so much opposition, that when the Bill went into Committee in the House of Commons, the whole clause was dropped, and in lieu thereof the Committee substituted this proviso and the present sect. 4.

The proviso represents a compromise between those who demanded the full term of life and fifty years, and those who desired to shorten, or at least not to extend the present period of copyright. Absolute monopoly will be enjoyed for twenty-five years after the author's death. Where

(*g*) Sect. 16 (1).
(*h*) Sect. 17.
(*i*) Sect. 21.
(*k*) Sect. 19 (1).
(*l*) Sect. 18.

§ 3.

the author lives for seventeen years or more after first publication, his works will enjoy absolute protection for a longer period than they get at present. If the author dies within the period of seventeen years after publication, his works will enjoy absolute protection for a shorter period than they get at present. On the whole, the average absolute protection in the case of books is probably less than it is under existing law. After the expiration of twenty-five years from the author's death, reproduction is free to all upon giving the prescribed notice and paying the 10 per cent. royalty as prescribed by the regulations of the Board of Trade.

Scope of the privilege.

The meaning of the proviso is not, in all respects, very clear. It is open to some doubt whether the liberty granted by the proviso is restricted to a liberty to reproduce the entire work as published by the author in the same form and without any alteration, or whether it would be permissible (1) to reproduce part only; (2) to reproduce in another form, *e.g.*, to reproduce a translation of the original sheet music in the form of a record, &c.; (3) to utilise the work as the basis of a new work so that the copyright work would only appear in fragments much altered and revised. It is submitted that, in the absence of any limitation, the greater will include the less, and that the work or part of it can be reproduced in any of the forms suggested.

An even more difficult point arises as to whether the liberty granted by the proviso extends to the reproduction of the work as part of a collective work, such as a newspaper collection of essays or hymns, or an encyclopedia, and if so, upon what basis the 10 per cent. royalty is to be calculated. It is submitted that reproduction in a collective work is permissible, and that, where so reproduced, the published price of the work reproduced must be ascertained by taking a proportionate part of the published price of the entire collective work.

"Price at which he publishes."

The price, it will be observed, is not the price at which the work is sold, but that at which it is published. It seems clear, therefore, that where a book is published at a price subject to discount, the full published price is to be taken in reckoning the royalties due.

Where publisher has agreed to pay

A further question arises under this proviso as to the position of a publisher who, before the passing of the Act, has taken an assignment of the copyright and has agreed

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author a higher royalty.

to pay the author a stipulated royalty, say 20 per cent., during the full term of the copyright. Before the old term of copyright has expired, the work may have come under the operation of this proviso. Other publishers will then have the right to reproduce upon payment of a royalty of 10 per cent. Must the original publisher continue to pay 20 per cent. under his contract until the expiration of the old term of copyright? It is submitted that he is not bound to do so, but may pay 10 per cent. only under the proviso. The meaning of the contract is that he shall pay 20 per cent. so long as he has the copyright in the sense in which it was then understood, that is to say, the sole and exclusive right of multiplying copies. There is no agreement to pay a 20 per cent. royalty after such sole and exclusive right has determined, and the right to reproduce has fallen in to the public domain. It seems fairly clear that the original publisher must then be entitled to claim the right along with the rest of the public to reproduce upon payment of the 10 per cent. royalty.

Where after expiration of original term publisher may continue to reproduce under sect. 24.

After the expiration of the old term of copyright, the extended period of copyright belongs to the author's representatives, but the original publisher may continue to reproduce the work under the provisions of sect. 24. If, however, the work has also fallen under the operation of the proviso to sect. 3, it is submitted that he can reproduce upon payment of a 10 per cent. royalty under that proviso, and is not bound to submit the amount of royalty to arbitration under sect. 24 (1) (a) (ii).

No corresponding right in relation to performing rights.

It will be observed that the proviso does not contain any provision for the public performance of works, or for the production of works which have been publicly performed but not published. In respect of these, the absolute monopoly is maintained for the full period of life and fifty years.

Application of proviso to posthumous works.

Primarily, this proviso does not apply to those cases where the duration of the copyright is expressly defined in other parts of the Act, that is to say (1) works of joint authors; (2) posthumous works; (3) photographs; (4) records, perforated rolls, &c. The proviso qualifies the period of life and fifty years prescribed in this section, but does not purport to qualify any special periods prescribed in other sections. In the case of posthumous works, however, which are dealt with in sect. 17, the

special period prescribed is fifty years from first publication or performance in public, and then it is provided that the proviso to sect. 3 "shall . . . apply as if the author had died at the date of such publication or performance." Posthumous works, therefore, may be reproduced on the royalty basis after the expiration of twenty-five years (or in the case of a work in which copyright subsists at the passing of the Act, thirty years) from first publication or performance.

Application of proviso to works of joint authors.

The application of the proviso to the works of joint authors is not quite so clear. In the case of such works, special provision as to the duration of copyright is made under sect. 16. The duration of copyright is fifty years from the death of the author who dies first, but if the author who dies last survives that period, then for his life. There is no express reference in the section to the proviso in sect. 3, but it is provided that "references in this Act to the period after the expiration of any specified number of years from the death of the author shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first, or after the death of the author who dies last, whichever period may be the shorter." It seems most probable that these words were inserted so as to bring the works of joint authors under the proviso in sect. 3, as well as under the proviso in sect. 5, which makes the last twenty-five years of the copyright unassignable by the author during his lifetime. Unfortunately, the proviso in sect. 3 is not expressly applied to the case of the works of joint authors, and upon a strict construction of the Act, it does not apply. It is submitted, however, that the strict construction ought to yield to the obvious intention of the draftsman, and to the consideration that it is of the utmost importance that the proviso in sect. 3 should fit in with the proviso in sect. 5. It is essential to the whole scheme of these two provisoes that, when the interest during any period is unassignable by the author, there should be a right during the same period to reproduce upon a royalty agreement. If this were not so, it would be a source of serious inconvenience to publishers, since they would not be able to continue the publication of a work without making a fresh contract with the author's representatives. As it is clear that the proviso in sect. 5 does apply to works of joint authors, the Courts

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ought to hold, in consonance with the general scheme of the Act, that the proviso in sect. 3 is equally applicable. Where the author who dies last survives the author who dies first by fifty years or more, there is no period of unassignable copyright. Where the author who dies last survives the author who dies first by more than twenty-five years (or in the case of works in which copyright subsists when the Act is passed, thirty years), but less than fifty years, the period of unassignable copyright is the residue of the fifty years remaining after the death of the author who dies last. Where the author who dies last survives the author who dies first by less than twenty-five years (or in the case of works in which copyright subsists when the Act is passed, thirty years), the period of unassignable copyright is twenty-five years (or in the case of works in which copyright subsists when the Act is passed, twenty years).

Application of proviso to photographs or records.

It is submitted that the proviso in sect. 3 has no application to photographs, or to records, perforated rolls, &c. These are specifically dealt with in sections 21 and 19 respectively. A literal construction of the Act does not bring them within the proviso, and there is nothing to show that there was any intention to apply the proviso to such works; and as the period of copyright is fifty years from the making of the work, and has no relation to the duration of the author's life, the proviso would be inappropriate to the subject-matter. Further, the "author" of a photograph or record may be a corporation, and in such a case the proviso would not only be inappropriate, but would be wholly inapplicable.

Existing law.—Under existing law there are different terms of copyright for different classes of work as follows:—

Books—Forty-two years from first publication or author's life and seven years, whichever period shall prove the longer.

Books bequeathed or given to a university, &c.—Perpetual copyright.

Paintings, drawings, and photographs—Author's life and seven years.

Engravings—Twenty-eight years from date of first publication.

Sculpture—Fourteen years from date of first publication, with a further period of fourteen years if at the expiration of the first term the person who originally made or caused the work to be made is alive, and has not parted with the copyright.

Performing right in dramatic or musical piece— § 3.

(i) If unpublished and unperformed—In perpetuity.

(ii) If published but unperformed—Twenty-eight years from first publication, or for the life of the author. EXISTING LAW.

(iii) If performed before the term, if any, under (ii) has expired—Forty-two years from first public performance, or life of author and seven years.

4. If at any time after the death of the author (*m*) of a literary (*n*), dramatic (*o*), or musical work which has been published (*p*) or performed in public (*q*) a complaint is made to the Judicial Committee of the Privy Council that the owner of the copyright in the work has refused to republish or to allow the republication of the work or has refused to allow the performance in public of the work, and that by reason of such refusal the work is withheld from the public, the owner of the copyright may be ordered to grant a licence to reproduce the work or perform the work in public, as the case may be, on such terms and subject to such conditions as the Judicial Committee may think fit. Compulsory licences.

This section reproduces sect. 5 of the Copyright Act, 1842. The right to apply to the Judicial Committee is now extended so as to cover works which have been publicly performed, although not published, and a licence to perform such works in public may be granted. Apparently, a licence may be granted to perform a work which has been published but not performed; but no licence may be granted to publish a work which has been performed in public but not published. Scope of the section.

It is doubtful how far the owner of the copyright may, by charging an extravagant price for copies or for admis- Illusory publication or performance.

(*m*) Sect. 16 (1).
(*n*) Sect. 35 (1) ("Literary Work").
(*o*) Sect. 35 (1) ("Dramatic Work").
(*p*) Sects. 1 (3), 35 (2).
(*q*) Sects. 35 (1) ("Performance"), 35 (2).

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sion to public performance, in effect, suppress the work and yet avoid the operation of this section by never declining to publish or perform when the demand is made that he shall do so. It may be said that there is a refusal to publish or perform in public when the publication or performance is merely technical and illusory; or it may be said that there is no publication or public performance unless the conditions are such that the enjoyment of the work is placed within reach of a substantial section of the general public, and not merely within the reach of a few multi-millionaires. To support any argument of this kind, however, the price asked would have to be absolutely out of all proportion to usual prices charged. A public performance, however, might be held to be illusory not only on the ground of excessive price, but because it was not a serious attempt to stage the work. If a play was to be occasionally performed in some small hall, the actors in plain clothes reading their parts from printed copies of the play, it might well be said that there was no public performance within the meaning of this section.

Ownership of copyright, &c.

5.—(1) Subject to the provisions of this Act (*r*), the author (*s*) of a work shall be the first owner of the copyright (*t*) therein:

Provided that—

(a) where, in the case of an engraving (*u*), photograph (*x*), or portrait, the plate (*y*) or other original was ordered by some other person and was made for valuable consideration in pursuance of that order, then, in the absence of any agreement to the contrary, the person by whom such plate or other

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(*r*) Sect. 18.
(*s*) Sects. 16 (2), 19 (1), 21.
(*t*) Sect. 1 (2).
(*u*) Sect. 35 (1) ("Engravings").
(*x*) Sect. 35 (1) ("Photograph").
(*y*) Sect. 35 (1) ("Plate").

original was ordered shall be the first owner of the copyright; and

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(b) where the author was in the employment of some other person under a contract of service or apprenticeship and the work was made in the course of his employment by that person, the person by whom the author was employed shall, in the absence of any agreement to the contrary, be the first owner of the copyright, but where the work is an article or other contribution to a newspaper, magazine, or similar periodical, there shall, in the absence of any agreement to the contrary, be deemed to be reserved to the author a right to restrain the publication of the work, otherwise than as part of a newspaper, magazine, or similar periodical.

Primâ facie copyright vests in author.

It is important to note that in all cases statutory copyright vests at the moment any work which is the subject of copyright is created. Unless the work is created under circumstances which bring the case under one of the express exceptions contained in the Act, the copyright vests in the author, and no other person can show a good title to sue, unless he can prove a written assignment from the author, or a transmission of the title by operation of law upon death or insolvency.

Exceptions.

The exceptions to the rule that copyright vests in the author are: (1) Government publications, copyright in which vests in the Crown; (2) certain works executed on commission; (3) works executed in the course of employment under a contract of service or apprenticeship; (4) records made before the commencement of the Act, copyright in which vests in the owner of the original plate at that date.

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Works executed on commission.

The vesting of copyright in the case of works executed on commission is limited to certain classes of artistic work, viz.: (1) all artistic work if the subject-matter is a portrait; (2) all engravings and photographs whatever the subject-matter.

Meaning of "portrait."

It may sometimes be a little difficult to define what is and what is not a portrait. It is submitted that it includes the representation of a group of persons as well as the representation of an individual. It is submitted that it also includes works of sculpture as well as paintings and other representations in the flat.

So long as the main object of the artist is to portray the characteristic individuality of any person or group of persons, the result is a portrait, even although it be merely a pen and ink sketch of some topical event, such as a group of distinguished visitors at a race meeting, or a group of the leading characters in some *cause célèbre* at the Law Courts. The main object of the sketch, however, must be portraiture, and the rest of the sketch must be incidental thereto. Where the main object of a sketch is the representation of some topical scene, such as the race for the Derby stakes, or the "Battle of Stepney," the introduction into the sketch, as an incidental element, of some well-known individual present on the occasion will not make the sketch a portrait.

Drawings commissioned for illustrating book not within the section.

It is a little unfortunate that all drawings were not included in the category of works, the copyright in which passes by operation of law to the person commissioning the work. Drawings are so frequently commissioned as illustrations for letterpress of all kinds, that it would be much more convenient if the necessity for a written assignment in each case could be dispensed with. As the section stands, it will be necessary to have such an assignment in the case of all drawings commissioned for illustration, except where the subject-matter of the drawing is a portrait.

Conditions precedent to vesting of copyright in commissioned work.

It will be observed that the following elements are necessary before the copyright passes in the case of a work executed on commission:—

(1) Order to execute.
(2) Giving or promising some valuable consideration.
(3) Execution in pursuance of the order.
(4) Absence of agreement to the contrary.

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"Valuable consideration."

The valuable consideration need not be in money. Where the proprietors of a school procured certain photographers to take photographs of the premises on the terms that they would only pay for such copies, if any, as they might afterwards approve of and select, it was held that the copyright in the photographs vested in them under the Fine Arts Copyright Act, 1862. The photographers, it was held, were employed for valuable consideration to take the photographs on behalf of the proprietors of the school. The valuable consideration consisted in the granting to them of liberty to come upon the premises, and the consequent chance of selling copies (*z*).

Actual payment not a condition precedent.

It will be observed that copyright passes immediately the work is executed in pursuance of the commission, and consequently payment of the artist, in the case of a money consideration, is not a condition precedent to the vesting of the copyright in the employer.

"Agreement to the contrary."

The proviso only operates to vest the copyright in the absence of any agreement to the contrary. It will be observed that such agreement need not be in writing, or even expressed in words. If the proper inference of fact from all the circumstances of the employment is that the mutual intention of the parties was that the copyright should remain with the author, it ought to be so held. The proviso merely raises a presumption in favour of the view that the copyright passes to the employer, but that presumption may be rebutted by any evidence of an agreement to the contrary.

Works executed by employee under contract of service.

Proviso (b) applies to all classes of work. The condition precedent to the passing of the copyright thereunder is the relationship of master and servant, or master and apprentice. A contract of service imports the right of control and supervision by the master over the servant during the execution of the work. Where such control and supervision exists, the work is done under a contract of service, notwithstanding that it is paid by results, that is to say, that the work is piece-work. Reporters, leader writers, editors and others on the permanent staff of a newspaper do their work under a contract of service. So, as a rule, do canvassers and other persons employed to do such work as the compiling of directories, year books, and the like.

(*z*) *Stackemann* v. *Puton*, [1906] 1 Ch. 774.

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Right of journalists, &c., to restrain separate publication.

The last few lines in proviso (b), reserving to the author the right to restrain the publication of the work otherwise than as part of the periodical of which it forms a part, were inserted by the House of Lords on the report stage of the Bill. There is a possible question here, whether the right to restrain separate publication is of such a nature that it will pass to the author's representatives, or whether it is a right merely personal to the author. It will be observed that, although in sect. 24 (2) the expression "author" includes his legal personal representatives, there is no similar provision with regard to this section. It is submitted, however, that the right is of a quasi-contractual nature, and must be dealt with as if it was a contract with the author and his representatives. If the owner of the periodical assigns the copyright, the restriction will run with the copyright in the hands of third parties.

Existing law.—The following is the probable effect of the statutory provisions at present in force in relation to the first vesting of the copyright, but the precise effect of these provisions in the case of engravings and works of sculpture is extremely doubtful.

(1) Copyright in engravings vests in the engraver, or, in the case of commission by an artist who causes his own design to be engraved, in the artist (*a*).

(2) Copyright in sculpture vests in the sculptor, or in the case of works executed on commission in the employer (*b*).

(3) Copyright in books vests in the author (*c*). In the case of collective works, where the author has been employed on the terms, express or implied, that the copyright shall vest in the proprietor of the collective work, and the author has been paid, copyright vests in such proprietor of the collective work (*d*). In the case of books published posthumously copyright vests in the proprietor of the author's manuscript at the date of first publication (*e*).

(4) Copyright in paintings, drawings, and photographs vests in the author, or, in the case of commission, when the work is

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(*a*) Engraving Copyright Act, 1734 (8 Geo. II. c. 13), s. 1; Engraving Copyright Act, 1766 (7 Geo. III. c. 38), ss. 1, 2.

(*b*) Sculpture Copyright Act, 1814 (54 Geo. III. c. 56), s. 1.

(*c*) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 3.

(*d*) *Trade Auxiliary* v. *Middlesborough* (1889), 40 Ch. D. 425; *Lamb* v. *Evans*, [1893] 1 Ch. 218; *Street* v. *Benning* (1855), 16 C. B. 459; *Trade Auxiliary* v. *Jackson* (1887), 4 T. L. R. 139; *Maple* v. *Junior Army and Navy Stores* (1882), 21 Ch. D. 369; *Brown* v. *Cooke* (1846), 16 L. J. Ch. 140; *Shepherd* v. *Conquest* (1856), 17 C. B. 427; *Stubbs* v. *Howard* (1895), 11 T. L. R. 507; *Platt* v. *Walter* (1867), 17 L. T. (N. S.) 157.

(*e*) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 3.

made and executed for or on behalf of another for valuable consideration, in the employer (*f*).

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Side by side with the statutory provisions there is judicial authority for the view that when any work is executed by a person in the course of his employment as the paid servant of another the copyright in that work vests in the employer (*g*).

Collective works. Copyright Act, 1842, s. 18.

When copyright is claimed by the proprietor of a collective work under sect. 18 of the Copyright Act, 1842, the proprietor must prove that the employment was on the terms that copyright should belong to him. Such terms need not, however, be expressed, and when a proprietor has employed and paid an author, there is a *primâ facie* presumption that the employment was on the terms that the copyright should belong to the proprietor (*h*). Payment is a condition precedent to the copyright vesting in the proprietor of the collective work, and, apparently, if the work is published before payment, copyright vests in the author, but passes by operation of law to the proprietor on payment being made (*i*). If two or more proprietors of several publications have jointly employed an author to compose a work which is published in their several publications, the proprietors of each publication has, subject to the rights of the other proprietors, a separate copyright as if he alone had employed the author (*k*). When the proprietor of a collective work has established his right under sect. 18, then, in the case of non-periodical works, the copyright passes to him absolutely. In the case, however, of periodicals, the proprietor only acquires the right to it as part of his periodical. He cannot, without the author's consent, publish it in any separate form (*l*), and after the lapse of 28 years from the day of first publication the author, or his assignee or personal representative, may publish separately, and on doing so acquires a concurrent copyright in the contribution. If, with the consent of the proprietor of the periodical, the author publishes in separate form before the expiration of 28 years, his concurrent copyright will date from such publication. Before the expiration of the 28 years, or publication in separate form, the author's interest is reversionary. His right against the proprietor is one of quasi-contract (*m*). Probably he could not sue third parties at law, but if third parties did print he would be entitled to demand that the proprietor should bring an action against them, and if the proprietor

(*f*) Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 1.

(*g*) *Hildesheimer* v. *Dunn* (1891), 64 L. T. 452; *Walter* v. *Lane*, [1900] A. C. 539; *Sweet* v. *Benning* (1855), 16 C. B. 459; *James Nisbet & Co., Ltd.* v. *The Golf Agency* (1907), 23 T. L. R. 570.

(*h*) *Lawrence and Bullen* v. *Aflalo*, [1904] A. C. 17; *Lamb* v. *Evans*, [1893] 1 Ch. 218; *Walter* v. *Howe* (1881), 17 Ch. D. 708; *Johnson* v. *Newnes*, [1894] 3 Ch. 663; *Coote* v. *Judd* (1888), 23 Ch. D. 727.

(*i*) *Trade Auxiliary* v. *Middlesborough* (1889), 40 Ch. D. 425; *Brown* v. *Cooke* (1846), 16 L. J. Ch. 140; *Richardson* v. *Gilbert* (1851), 1 Sim. (N. S.) 336; *Collingridge* v. *Emmott* (1888), 57 L. T. (N. S.) 864; *Trade Auxiliary* v. *Jackson* (1887), 4 T. L. R. 130.

(*k*) *Trade Auxiliary* v. *Middlesborough* (1889), 40 Ch. D. 425.

(*l*) *Mayhew* v. *Maxwell* (1860), 1 J. & H. 312; *Smith* v. *Johnson* (1863), 4 Giff. 632.

(*m*) *Johnson* v. *Newnes*, [1894] 3 Ch. 663.

§ 5 (1). refused he could bring an action against the proprietor and join the infringer as defendant.

EXISTING LAW. Notwithstanding sect. 18, an article may be contributed to a periodical under express or implied terms that the copyright shall belong to the proprietor for all purposes (*n*).

§ 5 (2). (2) The owner (*o*) of the copyright (*p*) in any work may assign the right (*q*), either wholly or partially, and either generally or subject to limitations to the United Kingdom or any self-governing dominion (*r*) or other part of His Majesty's dominions to which this Act extends (*s*), and either for the whole term of the copyright or for any part thereof, and may grant any interest in the right by licence, but no such assignment or grant shall be valid unless it is in writing signed by the owner of the right in respect of which the assignment or grant is made, or by his duly authorised agent:

Provided that, where the author (*t*) of a work is the first owner of the copyright therein, no assignment of the copyright, and no grant of any interest therein, made by him (otherwise than by will) after the passing of this Act, shall be operative to vest in the assignee or grantee any rights with respect to the copyright in the work beyond the expiration of twenty-five years from the death of the author, and the reversionary interest in the copyright expectant on the termination of that

(*n*) *Hereford* v. *Griffin* (1848), 16 Sim. 190.
(*o*) Sect. 5 (1).
(*p*) Sect. 1 (2).
(*q*) Sect. 5 (3).
(*r*) Sect. 35 (1) ("Self-governing dominion").
(*s*) Sects. 25 (1), 26 (1), 27, 28.
(*t*) Sects. 16 (2), 19 (1), 21.

period (*u*) shall, on the death of the author, notwithstanding any agreement to the contrary, devolve on his legal personal representatives as part of his estate, and any agreement entered into by him as to the disposition of such reversionary interest shall be null and void, but nothing in this proviso shall be construed as applying to the assignment of the copyright in a collective work (*x*) or a licence to publish a work or part of a work as part of a collective work. § 5 (2).

Divisibility of copyright,

Copyright is divisible as to—

(1) Method of reproduction;
(2) Place;
(3) Time.

The actual legal property, carrying with it the title to sue, can be split up and assigned to different persons (*y*).

"wholly or partially."

The provision that copyright may be assigned either wholly or partially enables any part of the monopoly to be separated from the rest. Thus the performing right in a work may be assigned to one person and the translating right in India may be assigned to another. In the case of an artistic work the right to make reproductions in the form of picture postcards may be assigned to one, and the right to produce a coloured print to another. In the case of music, the right to perform in public, the right to print sheet music and the right to make records may all be assigned to different persons, so that each in respect of the rights assigned shall have the full rights of a proprietor of copyright.

Exclusive right of sale cannot be separately assigned.

The exclusive right to sell or distribute copies is not part of the monopoly which constitutes copyright. The power to stop others from selling infringements is only an incidental right which is given to the owner of the copyright in order to protect his sole right of reproduc-

(*u*) Sect. 16 (1).
(*x*) Sect. 35 (1) ("Collective work").
(*y*) Sect. 5 (3).

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tion. A purported assignment of the sole right to sell copies within a prescribed area is not a partial assignment of copyright, and merely operates as a contract whereby the owner of the copyright as a contracting party agrees that he will not permit any other sale within the area specified. The grantee of the sole sale rights acquires no monopoly whereby he can sue third persons selling copies within his area. He can only proceed against them on the ground that they, knowing of the contract, procured the owner of the copyright to sell copies to them in breach of his contract (*z*).

Assignment *ex facie* absolute disproved by contemporaneous letters.

Where a document which purports on the face of it to be an unconditional assignment of the copyright is produced, the Court may inquire as to whether such document contains the whole agreement between the parties to the alleged assignment, and all other documents relating to such agreement must be produced. If the Court finds that upon the true construction of all the documents and other evidence there was no intention to assign the copyright in fact, but merely an intention to give the alleged assignees a temporary title for a temporary purpose, the Court will hold that there was no assignment of copyright, and the alleged assignees will have no title to sue (*a*).

Assignor may sell off stock in hand.

Since the right to sell copies of the work is not part of the monopoly, it follows that where any person has assigned his copyright, he can, notwithstanding such assignment, continue to sell copies which he made while he was the owner of the copyright (*b*).

Assignment of the prospective copyright in an un-created work.

It is submitted that although the Act specifically enacts that the author of a work shall be the first owner of the copyright, yet if the work is executed under a written agreement upon terms that the person on whose behalf the work is executed shall be the proprietor of the copyright, that is a sufficient assignment of the inchoate right, so that on the work being created the copyright will vest in the employer apart from any question

(*z*) *Londeker and Brown* v. *Wolff* (1908), Cop. Cas. 1905-10, p. 102.

(*a*) *Ibid.*

(*b*) *Taylor* v. *Pellow* (1869), L. R. 7 Eq. 418; *Howitt* v. *Hall* (1862), 6 L. T. (N. S.) 348.

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as to whether the circumstances do or do not bring the case under one of the provisoes in section 5 (1) (*c*).

It is unfortunate that the Act does not provide for the assignment of a right of action in respect of past infringements. It is very common to find that an injured party has an equitable title which requires some formality to make the legal title complete. This has to be completed before issue of writ; but unless the previous legal owner can assign the right to sue, he must be joined as co-plaintiff in order to recover damages for past offences (*d*). In the absence of express statutory provision, it would seem that the right to sue cannot be assigned (*e*).

Assignment of right of action in respect of past infringement.

It is clear that no legal copyright can pass unless there is an assignment *de presenti* of the then existing copyright or, in the case of a work not yet in existence, of the assignor's whole right, title and interest in the subject-matter (*f*). An executory agreement being merely a promise *de futuro* cannot pass the legal right, although it may operate as an equitable assignment, and entitle the other contracting party to specific performance, or to a demand that the owner of the copyright shall permit him to sue infringers in his, the legal owner's name (*g*). No actual words of assignment are necessary in order to pass the copyright (*h*). If from the document itself it is evident that the proprietor of the copyright intended at that time to assign his copyright, it is sufficient. Thus a receipt for the consideration money may operate as an assignment of the copyright (*i*).

Executory agreement to assign not operative as an assignment.

(*c*) *Ward, Lock & Co.* v. *Long*, [1906] 2 Ch. 550; *Macmillan* v. *Dent*, [1907] 1 Ch. 49; *Life Publishing Co.* v. *Rose Publishing Co.* (1906), 12 Ont. L. R. 386.

(*d*) *Dupuy* v. *Dilkes* (1879), 48 L. J. Ch. 682; *Chappell* v. *Purday* (1843), 12 M. & W. 303.

(*e*) *Dawson* v. *G. N. & City Ry.*, [1904] 1 K. B. 277; [1905] 1 K. B. 260; *May* v. *Lane* (1894), 64 L. J. Q. B. 237; *King* v. *Victoria Insurance*, [1896] A. C. 250.

(*f*) *Levy* v. *Rutley* (1871), L. R. 6 C. P. 523; *Leader* v. *Purday* (1849), 7 C. B. 4; *Colburn* v. *Duncombe* (1838), 9 Sim. 151; *London Printing and Publishing Co.* v. *Cox*, [1891] 3 Ch. 291.

(*g*) *Hazlitt* v. *Templeman* (1866), 13 L. T. (N. S.) 593; *Grace* v. *Newman* (1875), L. R. 19 Eq. 623; *Cox* v. *Cox* (1853), 11 Hare, 118; *Sweet* v. *Cater* (1841), 11 Sim. 572; *Sweet* v. *Shaw* (1839), 8 L. J. Ch. 216; *Sims* v. *Marryat* (1851), 17 Q. B. 281; *Strachan* v. *Graham* (1867), 16 L. T. (N. S.) 87; *Thombleson* v. *Black* (1837), 1 Jur. 198.

(*h*) *Lacy* v. *Toole* (1867), 15 L. T. (N. S.) 512.

(*i*) *Kyle* v. *Jefferys* (1859), 3 Macq. 611; 18 D. 911; *Tree* v. *Bowkett*

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Assignment in foreign country.

It has been suggested that, where an assignment of copyright takes place in a foreign country, the validity of such assignment ought to be determined by the law of the country where it is made (*k*). No doubt this is the general rule, but it probably has no application to the case of a statutory right in the nature of copyright, where the statute prescribes a particular form of assignment. It is submitted that, as far as an English Court is concerned, no assignment is operative unless made in writing as required by the Act.

Warranty of title.

Where a person purports to assign a copyright *simpliciter*, he warrants that he has a valid and unincumbered title, and if the title proves defective, the assignee may sue him for damages for breach of warranty (*l*).

Whether obligation to pay royalties runs with the copyright.

A question arises as to how far an assignee of a copyright is bound by any agreement on the part of his assignor to pay royalties or a share of profits to the author. This point is of great importance in the case of publishing agreements where the author parts with his copyright in consideration of an agreement on the part of the publisher to pay royalties or a share of profits. It has been held, in the case of an assignment of patent rights, that an agreement by the assignee to pay a royalty on the future working of the patent represents the purchase price for the patent, and that the vendor has therefore a lien on the patent for future royalties as being the balance of unpaid purchase-money (*m*). This lien for royalties can only, however, be exercised as against a subsequent assignee of the copyright taking gratuitously or with notice of the existence of the agreement. It cannot be exercised against an assignee taking for value and without notice. It is also necessary that the agreement to pay royalties should be an agreement in general terms to pay so much upon each copy sold. If the agreement is to pay upon copies manufactured and sold by the original publishers with whom the agreement

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(1895), 74 L. T. (N. S.) 77; *Lorer* v. *Davidson* (1856), 1 C. B. (N. S.) 182; *Latour* v. *Bland* (1818), 2 Stark. 382; *Levy* v. *Rutley* (1871), L. R. 6 C. P. 523; *Colburn* v. *Duncombe* (1838), 9 Sim. 151.

(*k*) *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815, 940; *Cocks* v. *Purday* (1848), 5 C. B. 860.

(*l*) *Sims* v. *Marryat* (1851), 17 Q. B. 281; *Queensberry* v. *Shebbeare* (1758), 2 Eden, Ch. Cas. 330.

(*m*) *Dansk, &c.* v. *Snell*, [1908] 2 Ch. 127, and cases there cited.

is made in the first instance, then there is no liability to pay royalties on copies made and sold by the assignee of the copyright (*n*).

Copyright passes on death as owner's personal property.

Copyright is personal property and passes on the death of the owner to his personal representatives (*o*). A bequest of "all my books" has been held to include valuable manuscript notes left by a physician (*p*). Where an author by his will directed his trustee to pay the "free annual income" of his estate to his niece, it was held that all the proceeds from literary works published in the testator's lifetime should be paid as income, but that all proceeds from works posthumously published should be invested as capital (*q*).

Bankruptcy.

Copyright comes within the vesting section of the Bankruptcy Act, and passes to the trustee of a bankrupt owner (*r*).

Licence distinguished from partial assignment.

A licence must be distinguished from a partial assignment. A licence passes no part of the legal property in the copyright, but is merely a contractual relation between the parties. If there is any doubt as to whether a written instrument is to be construed as a licence or an assignment, the answer will, as a rule, depend upon whether or not there are terms in the contract which show a reliance on the part of the grantor on the personal skill or reputation of the grantee. If they do, then a licence is to be presumed rather than an assignment (*s*). For instance, a grant of the "sole and exclusive right of printing and publishing" is in itself an ambiguous expression, but if the agreement bears the personal imprint, it will be construed as a licence only, and not as a total or partial assignment of the copyright (*t*).

Licensee cannot sue alone.

A licence differs from an assignment in that it does

(*n*) *Nichols* v. *Amalgamated Press* (1908), Cop. Cas. 1905-10, p. 166.
(*o*) *Latour* v. *Bland* (1818), 2 Stark. 382.
(*p*) *Willis* v. *Curtois* (1838), 1 Beav. 189.
(*q*) *Davidson's Trustees* v. *Ogilvie*, [1910] S. C. 294.
(*r*) *Mawman* v. *Tegg* (1826), 2 Russ. 385, 392.
(*s*) *Hole* v. *Bradbury* (1879), 12 Ch. D. 886; *Stevens* v. *Benning* (1854), 1 K. & J. 168; *Reade* v. *Bentley* (1857), 3 K. & J. 271; 4 K. & J. 656; *Cooper* v. *Stephens*, [1895] 1 Ch. 567; *Bastow*, *Ex parte* (1854), 14 C. B. 631; *Black* v. *Imperial Book Co.* (1904), 8 Ont. L. R. 9.
(*t*) *The Liedertafel Series*, *In re*, [1907] 1 Ch. 651; *Clinical Obstetrics*, *In re* (1908), Cop. Cas. 1905-10, p. 176; *Booth* v. *Richards* (1910), The Times, July 14, Cop. Cas. 1905-10, p. 284.

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not carry with it the right to sue third parties in respect of infringement (*u*).

Question whether licence binds subsequent assignees for value and without notice.

A licence must be in writing. It is submitted that if there is a valid licence in writing, an interest is carved out of the copyright, and a subsequent assignee of the copyright takes subject to that interest. In the absence, however, of express provision, it might be argued that the interest of a licensee being a merely equitable interest, could not be asserted against an assignee who took a legal assignment of the copyright for value and without notice of the licence. It is submitted that under the Act a licence in writing is something more than an equitable interest, and that it does attach to the copyright as a legal statutory right by which the assignee is bound just as much as the assignor who granted the licence.

Primâ facie licence not a sole licence.

A licence is not to be presumed to be a sole licence, and unless it is expressly stated, or must necessarily be implied from the circumstances, that it is so, the first licensee cannot restrain the licensor from granting, or a second licensee from acting on, a second licence (*x*).

Nature of licensee's remedy against infringers.

Even where there is a sole and exclusive licence for the full term of the copyright the legal title to sue remains in the proprietor of the copyright (*y*). If the proprietor refuses to sue an infringer the licensee may bring an action against the infringer and join the legal proprietor as defendant. If action is taken in the name of the proprietor of the copyright, the licensee may be properly joined as co-plaintiff in respect of his equitable right to a share, or to the whole, of the damages recovered (*z*). It does not, however, appear to be necessary to join the licensee in order to recover the full quantum of damage, although it has been said that an owner of copyright who has granted an exclusive licence cannot sue unless the owner has obtained the consent of the assignee (*a*).

(*u*) *Neilson* v. *Horniman* (1909), 25 T. L. R. 685. There was formerly some doubt on this point. (*Trade Auxiliary* v. *Middlesborough* (1889), 40 Ch. D. 425; *Tuck* v. *Canton* (1882), 51 L. J. Q. B. 363; *Sweet* v. *Cater* (1841), 11 Sim. 572.)

(*x*) *Warne* v. *Routledge* (1874), L. R. 18 Eq. 497; *Sweet* v. *Cater* (1841), 11 Sim. 572; *Stevens* v. *Benning* (1855), 1 K. & J. 168.

(*y*) *Neilson* v. *Horniman* (1909), 25 T. L. R. 685.

(*z*) *Macmillan* v. *Dent*, [1907] 1 Ch. 107.

(*a*) *Taylor* v. *Neville* (1878), 26 W. R. 299; *Tree* v. *Bowkett* (1895), 74 L. T. 77.

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A licence may or may not be revocable according to the terms thereof. *Primâ facie*, a licence is revocable, and even although the licensee may by the exercise of the licence have created a substantial interest in its continuation, that is not sufficient to render irrevocable a licence which in the first instance was revocable at the will of the owner of the copyright. For instance, the grantee of a licence to reproduce a photograph in an illustrated paper cannot, merely because he has made a plate from which the photograph can be reproduced, allege that he has a vested interest which entitles him to reproduce the photograph a second time in a future number of his paper (*b*). Where a licence is granted in general terms without any express condition that the right may be exercised for a specified time or for a specified purpose, there is a strong presumption that it is merely a licence at will which may be revoked at any time. The licence, however, cannot be revoked except upon notice which is reasonable under the circumstances. The owner of the copyright, having granted a licence in general terms, cannot revoke it just after the licensee has incurred expenditure in preparing for the reproduction of the work, but before the actual reproduction has taken place (*c*).

How far licence is revocable.

Even although a licence is revoked, or has otherwise terminated, the right to dispose of copies made during the subsistence of the licence continues in the absence of any agreement to the contrary.

Right to dispose of copies after termination of licence.

Licences may be granted for a definite period or for a specified purpose, and if so granted for good consideration are irrevocable until the period has elapsed or the specified purpose been accomplished, as the case may be. Thus, subject to the proviso in this section, a licence to reproduce may be granted for the full term of the copyright. If a licence is granted by the owner of the copyright to the proprietor of a collective work to reproduce his work as part of the collection, it is submitted that such a licence is a licence for a specified purpose which is not accomplished so long as the licensee continues to reprint and sell the collective work. Such a licence, therefore, cannot be revoked at any time by

Licence for a specified time or object.

(*b*) *Bowden Bros.* v. *Amalgamated Pictorials, Ltd.*, [1911] 1 Ch. 386.
(*c*) *Warne* v. *Routledge* (1874), L. R. 18 Eq. 497.

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the licensor. The same principle applies to a licence to make use of a work in the preparation of a new work. Such a licence implies the right to continue to print and reprint the new work as long as there is a demand therefor.

How far licence purely personal.

A question arises as to how far a licence is purely personal to the grantee. It is clear that the licence embraces the licensee and all servants and agents employed by him in the making of the work for which a licence was granted (*d*). Beyond this the licence is *primâ facie* purely personal to the grantee, and no third party can rely upon it as a defence to an action brought against him. Even where the agreement containing the licence purports to be made between the parties "for themselves, their respective heirs, successors and assigns," yet if the licensee has undertaken contractual duties, the performance of which depends upon his personal skill or reputation, then he cannot delegate such duties to a third person, and accordingly cannot transfer the licence to a third person (*e*). If, however, a publisher, for instance, continues to perform his personal obligations under a publishing agreement, that is to say, continues to supervise the publication and to publish the work in his own name, he may at the same time enter into an agreement with a limited company to give the company the benefit of the agreement with the author, holding such agreement in trust for the company, and the company on their part undertaking to carry out the agreement as the agent of the publisher (*f*).

When the licence is to make use of a copyright work in the preparation of a new work, once the new work is compiled within the terms of the licence, the licence must probably be deemed to permit not only the author of the new work, but also his representatives and successors in business, to continue to print and reprint the work. It is doubtful, however, whether by assigning the copyright of the new work to a third party he could assign to him the benefit of the licence and the right to reprint the work.

(*d*) *Booth* v. *Richards* (1910), The Times, July 14, 1910; Cop. Cas. 1905—10, p. 284.

(*e*) *Booth* v. *Richards* (1910), Cop. Cas. 1905—10, p. 284; The Times, July 14.

(*f*) *Ibid.*

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In the case of *Evans* v. *Tout* (*g*), the author of certain transcripts from Welsh manuscripts granted a licence to the professor of Welsh in the Victoria University, Manchester, to make use of his transcripts for the purpose of compiling an educational book intituled "An introduction to Early Welsh." The book was prepared by the professor, and he had arranged for its publication by the University Press, when he died. The University procured another professor to see the book through the press, and write a preface. The author of the Welsh manuscripts complained that his copyright was infringed, and, *inter alia*, alleged that the licence was purely personal in favour of the professor who died, and did not extend to the publication of a work edited and prefaced by another man. The case was ultimately compromised on the defendant's consenting to publish the book with a new preface in a form to be approved by the Vice-Chancellor of the University.

Effect of oral licence as an estoppel.

It is submitted that, notwithstanding the provision that a licence shall not be valid unless it is in writing, an oral licence may operate as an estoppel. The owner of the copyright could not, having granted an oral licence, sue the licensee and recover damages for acts done within the terms of such licence and without any revocation of the licence on the part of the owner of the copyright. An oral licence, however, whatever its terms, may be revoked at any time, and proceedings may be taken in respect of any act done after the revocation. An oral licence will not estop any assignee of the copyright from taking proceedings, even although he took his assignment with notice of such licence.

Proviso.

The object of the proviso is to secure the fruits of the extended period of copyright to the author's family, and to prevent the whole benefit going to the publishers. Apparently, the proviso applies to all works to which the Act applies, including those where the copyright is measured not by a period of years after the death of the author, but by a period of years after the making of the work. Thus, it apparently applies to copyright in photographs and records, so that, if the copyright in such works does exceed the period of the author's life and twenty-

(*g*) Cop. Cas. 1905—10, p. 213; The Times, February 11, 1909.

§ 5 (2). five years after his death, the residue after the expiration of that period is unassignable (*h*).

The proviso in sect. 3, which entitles any person after the expiration of twenty-five years after the author's death to reproduce a work on payment of a 10 per cent. royalty, mitigates the severity of this proviso as against the publisher who has reproduced the work under a contract with the author. Unfortunately, the former proviso does not, it would seem, apply to photographs, records, &c. The omission of records is not serious, but the omission of photographs may operate harshly when a publisher has purchased photographs for the purpose of reproduction, as illustrations in a book. If the copyright in such photographs is still subsisting, and reverts to the author's representatives twenty-five years after his death, the publisher will have to make a new contract if he desires to continue to reproduce them.

Application to existing works.

Sub-sect. (2) of sect. 5, including the proviso, appears to be equally applicable to existing works which acquire copyright, under sect. 24, as to works created after the commencement of the Act. If at the passing of the Act the author of such a work has not assigned his copyright, he cannot thereafter assign it so as to divest his personal representatives of the reversionary interest which will pass to them on the lapse of twenty-five years after the author's death. Here again, the proviso to sect. 3 does not seem to give the assignee the full relief to which he is entitled. A work in which copyright subsists at the passing of the Act does not come under the royalty proviso until thirty years after the death of the author. In such works, therefore, an assignee from the author cannot get an assignment which will entitle him to continue the reproduction of the work without interruption. There is a break of five years during which the copyright becomes re-vested in the author's personal representatives without any corresponding relief under sect. 3.

Saving of collective work and contributions thereto.

It would have been a great hardship to the proprietors of collective works, particularly those of a more permanent nature, such as encyclopædias, if they could not have acquired from the author of a contribution an unfettered

(*h*) The "author" of such works may, however, be a body corporate (sects. 19 (1), 21), and where that is so this proviso is clearly inapplicable, and the full term of copyright may be assigned.

right to produce such contribution at any future time as part of the encyclopædia. The object of the last three lines of the proviso is to permit (1) the editor or other person who may be considered to be the author of the collection as a whole to assign to the proprietors all right, title and interest in the work which might otherwise vest in him as author; (2) a contributor to grant a perpetual licence for the reproduction of his contribution as part of the collection.

It seems reasonably clear that if a contributor were to grant an *ex facie* absolute assignment of his copyright in the contribution, then in so far as the proviso would prevent that assignment from operating as such beyond the period of twenty-five years after the contributor's death, it would nevertheless continue to operate as a licence to the proprietor of the collection to continue to reproduce the contribution as part of the collection.

Sale of reversionary interest after author's death.

It will be observed that the author may dispose of his reversionary interest by will, and immediately upon the author's death his executors or legatees may sell such reversionary interest.

Existing law.—The divisibility of copyright has been the subject of some doubt (*i*). Probably it is divisible as to time or place, and, perhaps, as to the method of reproduction (*k*). An assignment of copyright or performing right must be in writing (*l*); in the case of a book, if the work has been previously registered in the name

(*i*) *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815; *Shepherd* v. *Conquest* (1856), 17 C. B. 427, 436; *Trade Auxiliary* v. *Middlesborough* (1889), 40 Ch. D. 434, 435.

(*k*) *Landeker and Brown* v. *Wolff* (1908), Cop. Cas. 1905—10, p. 102; *Taylor* v. *Neville* (1878), 26 W. R. 299; *Tree* v. *Bowkett* (1895), 74 L. T. (N. S.) 77; *Lucas* v. *Cooke* (1880), 13 Ch. D. 872; *Holt* v. *Woods* (1896), 17 N. S. W. R. Eq. 36; *Dobson, Ex parte* (1892), 12 N. Z. L. R. 171; *Howitt* v. *Hall* (1862), 6 L. T. (N. S.) 348; *Sweet* v. *Cater* (1849), 11 Sim. 572; *Davidson* v. *Bohn* (1848), 6 C. B. 456.

(*l*) *Leyland* v. *Stewart* (1876), 4 Ch. D. 419; *Power* v. *Walker* (1814), 3 M. & S. 7; *Davidson* v. *Bohn* (1848), 6 C. B. 456; *Clementi* v. *Walker* (1824), 2 B. & Cr. 861; *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815, 906, 944; *Kyle* v. *Jefferys* (1859), 3 Macq. 611, 617; 18 D. 906; *Cumberland* v. *Copeland* (1862), 1 H. & C. 194; *Cocks* v. *Purday* (1848), 5 C. B. 860; *Cooper* v. *Stephens*, [1895] 1 Ch. 567; *Marshall* v. *Petty* (1900), 17 T. L. R. 684; *Shepherd* v. *Conquest* (1856), 17 C. B. 427; *Eaton* v. *Lake* (1888), 20 Q. B. D. 378; *Hardacre* v. *Armstrong* (1905), 21 T. L. R. 189; Fine Arts Copyright Act, 1862, s. 3; *Morton* v. *Copeland* (1855), 16 C. B. 517; *Liverpool General Brokers* v. *Commercial Press*, [1897] 2 Q. B. 1; *Wood* v. *Boosey* (1867), 7 B. & S. 897; *Morang* v. *Publishers* (1900), 32 Ont. R. 393.

§ 5 (2). of the assignor, by an entry of assignment on the register (*m*). The performing right in a dramatic or musical work does not pass with
EXISTING LAW. an assignment of the copyright in the work, unless such performing right is expressly conveyed, or such words are used as to show the intention of the parties that the performing right in the work shall be conveyed (*n*). In the case of engravings the written assignment of copyright must be witnessed by two or more credible witnesses, but when the plate or block is also transferred, then apparently the copyright may pass with it by any informal writing, or even by word of mouth (*o*). In the case of sculpture the copyright must be assigned by deed, signed and sealed by the proprietor in the presence of, and attested by, two credible witnesses (*p*).

Copyright and performing right are both personal property, and the right passes by operation of law on the death or bankruptcy of the proprietor (*q*).

In the case of an unpublished manuscript the common law right may be assigned orally, and both in the case of an unpublished manuscript, and in the case of a work not yet composed, the inchoate copyright may be assigned by a written instrument executed before the copyright or the work has come into existence (*r*).

Whether or not the inchoate copyright can be assigned otherwise than in writing has been the subject of some doubt and considerable difference of judicial opinion (*s*).

§ 5 (3). (3) Where, under any partial assignment (*t*) of copyright (*u*), the assignee becomes entitled to any right comprised in copyright (*u*), the assignee as respects the right so assigned, and the assignor

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(*m*) Copyright Act, 1842 (5 & 6 Vict. c. 45), ss. 13, 20, 22; *Stevens* v. *Wildy* (1850), 19 L. J. Ch. 190.

(*n*) Sect. 22; *Marsh* v. *Conquest* (1864), 17 C. B. (N. S.) 418; *Hutchins, Ex parte* (1879), 4 Q. B. D. 483.

(*o*) Engraving Copyright Act, 1734 (8 Geo. II c. 13), s. 1; Prints Copyright Act, 1777 (17 Geo. III. c. 57): Prints and Engravings Copyright Act, 1836 (6 & 7 Will. IV. c. 59), s. 2.

(*p*) Sculpture Copyright Act, 1814 (54 Geo. III. c. 56), s. 4.

(*q*) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 25; Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), s. 3.

(*r*) *Ward, Lock & Co.* v. *Long*, [1906] 2 Ch. 550; *Macmillan* v. *Dent*, [1907] 1 Ch. 107.

(*s*) *Clementi* v. *Walker* (1824), 2 B. & Cr. 861; *Cary* v. *Kearsley* (1802), 4 Esp. 168; *Storace* v. *Longman* (1788), 2 Camp. 26, n.; *Power* v. *Walker* (1814), 3 M. & S. 7; *Colburn* v. *Duncombe* (1838), 9 Sim. 151; *Sweet* v. *Shaw* (1839), 8 L. J. Ch. 216; *Hodges* v *Welsh* (1840), 2 Ir. Eq. R. 266; *Jefferys* v. *Boosey* (1854), 4 H. L. C. 815, 880; *McLean* v. *Moody* (1858), 20 D. 1154; *Jefferys* v. *Kyle* (1856), 18 D. 906; *Cocks* v. *Purday* (1848), 5 C. B. 860; *Frowde* v. *Parish* (1896), 27 Ont. R. 526; *Macmillan* v. *Suresh Chunder Deb* (1890), Ind. L. R. 17 Calc. 951.

(*t*) Sect. 5 (2).

(*u*) Sect. 1 (2).

as respects the rights not assigned, shall be treated for the purposes of this Act as the owner(x) of the copyright, and the provisions of this Act shall have effect accordingly. § 5 (3).

This is merely consequential. If copyright is divisible the assignee of any portion of the copyright must, with regard to the rights comprised in that portion, be treated as the owner of the copyright. If it were otherwise there would be no assignment, but merely a licence. Position of partial assignee.

(x) Sect. 5 (2).

Civil Remedies.

§ 6 (1). Civil remedies for infringement of copyright.

6.—(1) Where copyright (*a*) in any work has been infringed (*b*), the owner of the copyright (*c*) shall, except as otherwise provided by this Act (*d*), be entitled to all such remedies by way of injunction or interdict, damages, accounts, and otherwise, as are or may be conferred by law for the infringement of a right.

Meaning of "where copyright . . . has been infringed."

Infringement of copyright is defined in sect. 2, and includes (1) acts done in direct invasion of the monopoly; (2) incidental acts such as selling, importing and otherwise dealing with infringements, knowing them to be such. In addition, the statute by sect. 16 prohibits the importation of copies of a work if such copies have been made outside the United Kingdom; and by sect. 7 all infringing copies of a work, that is, copies made or imported in contravention of the provisions of the Act, are deemed to be the property of the proprietor of the copyright, and he may bring an action for detinue or conversion. The importation of copies prohibited by sect. 16 or the possession or dealing with infringing copies is not specifically stated to be an infringement of copyright, and therefore it may be said that such cases do not come within the words, "where copyright . . . . has been infringed." There can, however, be no doubt that if an action were brought under sect. 16 or sect. 7 all the common law remedies would apply, and the plaintiff would be entitled to the same relief as if such cases had been specifically mentioned in this sub-section. Where a right is created by statute, and no specific remedy is provided, the

(*a*) Sect. 1 (2). (*b*) Sect. 2. (*c*) Sect. 5. (*d*) Sects. 8, 9.

ordinary common law and equitable remedies of damages, injunction, delivery up, and account of profits will attach for the preservation of that right (*e*). **§ 6** (1).

This sub-section provides that, where there is an invasion of the right of property created by the statute, the consequential relief shall be that which attaches by the rules of common law and equity to the invasion of any other property of a like nature. Meaning of "such remedies . . . as may be conferred by law."

Theso remedies are:—

(1) Injunction (the equivalent in Scotland being an interdict). Injunction.

An injunction is an equitable remedy. An injunction pending trial may be granted on motion where there is a strong *primâ facie* case on affidavit evidence. An interim injunction will not, as a rule, be granted if there is a real issue to be tried on the facts, or even if there is a difficult and doubtful point of law to be decided (*f*). In doubtful cases weight will be given to the consideration as to which side is more likely to suffer from an erroneous decision (*g*). An interim injunction may be refused on the ground that an oral licence to copy is alleged (*h*), or on the ground of an allegation by the defendant that the plaintiff has been guilty of copying from the defendant (*i*). An interim injunction will not be granted if there has been any undue delay in bringing proceedings (*k*). The granting of such an injunction is a Judicial discretion. Interim.

(*e*) *Novello* v. *Sudlow* (1852), 19 C. B. 177; *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501.

(*f*) *West Publishing Co.* v. *Thompson* (1910), 176 Fed. Rep. 833; *Benton* v. *Van Dyke* (1909), 170 Fed. Rep. 253; *Sweet* v. *Bromley* (1907), 154 Fed. Rep. 754; *American Mutoscope, &c.* v. *Edison* (1905), 137 Fed. Rep. 262.

(*g*) *M'Neill* v. *Williams* (1847), 11 Jur. 344; *Hogg* v. *Kirby* (1803), 8 Ves. 215; *Maple* v. *Junior Army and Navy Stores* (1882), 21 Ch. D. 369, 372.

(*h*) *Ricordi* v. *Hammerstein* (1907), 150 Fed. Rep. 450.

(*i*) *Sweet* v. *Bromley* (1907), 154 Fed. Rep. 754.

(*k*) *Southey* v. *Sherwood* (1817), 2 Mer. 435; *Platt* v. *Bolton* (1815), 19 Ves. 447; *Saunders* v. *Smith* (1838), 3 My. & C. 711; *Lewis* v. *Chapman* (1840), 3 Beav. 133; *Robinson* v. *Wilkins* (1805), 8 Ves. 224, n.; *Baily* v. *Taylor* (1829), 1 Russ. & My. 73; *Rundell* v. *Murray* (1821), Jac. 311; *Buxton* v. *James* (1851), 5 De G. & Sm. 80; *Werner* v. *Encyclopædia Britannica* (1905), 134 Fed. Rep. 831; *Sweet* v. *Bromley* (1907), 154 Fed. Rep. 754; *Ricordi* v. *Hammerstein* (1907), 150 Fed. Rep. 450; *West Publishing Co.* v. *Thompson* (1910), 176 Fed. Rep. 833.

§ 6 (1).

matter of judicial discretion, and therefore where the judge of first instance has granted or refused the injunction, the Court of Appeal will not readily reverse his decision (*l*). An interim injunction is only granted on the undertaking by the plaintiff to compensate the defendant if on the trial of the action it is held that no injunction ought to have been granted (*m*).

At the trial.

An injunction, although refused on motion, may be granted at the trial of the action if an infringement is proved. Delay or acquiescence is not a defence to a claim for a perpetual injunction at the hearing (*n*).

Probability of damage.

An injunction may be granted without any proof of actual damage (*o*), but there must be probability of damage (*p*).

Form of injunction.

The Court does not wait until it can ascertain distinctly what parts have been pirated, but will grant an injunction in general terms restraining the defendant, his servants, agents or workmen from further printing, publishing, selling, or otherwise disposing of any copy or copies of the defendant's book containing any passage or passages copied, taken, or colourably altered from the plaintiff's book (*q*). If it appears that the piratical part of the defendant's book can be distinguished from that which is innocent, this will be done in the injunction (*r*).

Future numbers of periodical.

In one case where there had been a systematic infringement of a periodical, North, J., declined to grant an injunction as to the future numbers on the ground that the copyright in them had not yet come into being (*s*). In another case, however, Kekewich, J., granted an injunc-

(*l*) *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501; *Werner* v. *Encyclopædia Britannica* (1905), 134 Fed. Rep. 831.

(*m*) *Chappell* v. *Davidson* (1856), 8 De G. M. & G. 1; *Novello* v. *James* (1854), 24 L. J. Ch. 111.

(*n*) *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444; *Morris* v. *Ashbee* (1868), L. R. 7 Eq. 34; *Johnston* v. *Wyatt* (1863), 2 De G. J. & S. 25.

(*o*) *Campbell* v. *Scott* (1842), 11 Sim. 31; *Tinsley* v. *Lacy* (1863), 1 H. & M. 747.

(*p*) *Borthwick* v. *Evening Post* (1888), 37 Ch. D. 449, 462.

(*q*) *Lewis* v. *Fullarton* (1839), 2 Beav. 6; *Kelly* v. *Morris* (1866), L. R. 1 Eq. 697; *Mawman* v. *Tegg* (1826), 2 Russ. 385.

(*r*) *Jarrold* v. *Houlston* (1857), 3 K. & J. 708; *Lamb* v. *Evans*, [1892] 3 Ch. 462.

(*s*) *Cate* v. *Devon, &c. Newspaper Co.* (1889), 40 Ch. D. 500, 507; *Trade Auxiliary* v. *Middlesborough* (1887), 40 Ch. D. 425.

tion restraining the defendants from infringing the current or any future numbers of a periodical (*t*). § 6 (1).

An injunction may be refused where the infringement is trivial and there is no serious probability of it being repeated (*u*).

(2) Damages. Damages.

If proceedings are taken under sect. 7, damages may be recovered as in an action for conversion, that is to say, the plaintiff will be entitled to the gross proceeds of the sales of the infringing work. The pleadings ought to state specifically that the claim is made on this basis.

If the claim is not, or cannot be, made under sect. 7, the damage recoverable is the actual loss which the plaintiff has suffered as the natural or probable consequence of the infringement. Such loss may be proved by showing a diminution of the plaintiff's sales; but in many cases consequential damage of a more indirect character may be established, as where the plaintiff's work has been vulgarised by the unauthorised reproduction. In the case of advertisements, show cards and similar copyright matter, the defendant's infringement may have rendered the plaintiff's advertisements practically useless, and he might properly claim as damages the cost of having fresh advertisements prepared and printed.

Damages may be assessed by a judge or jury upon evidence given in Court, or may be the subject of an inquiry in Chambers.

(3) Profits. Profits.

This is an equitable remedy, and is usually an alternative to a claim for damages. The gross profits of the defendant's sale may be recovered as damages under sect. 7, but apart from that section, the profits recoverable in equity are the net profits (*x*).

If the defendant's work is not wholly piratical, the

(*t*) *Bradbury* v. *Sharp* (1891), **W. N.** 143.

(*u*) *Cox* v. *Land and Water* (1869), L. R. 9 Eq. 324; *Southern* v. *Bailes* (1894), 38 S. J. 681; *Baily* v. *Taylor* (1829), 1 Russ. & M. 73; *Lewis* v. *Fullarton* (1839), 2 Beav. 6, 11.

(*x*) *Delfe* v. *Delamotte* (1857), 3 K. & J. 581. See *Pike* v. *Nicholas* (1869), L. R. 5 Ch. 251, 255, 260; *Hogg* v. *Kirby* (1803), 8 Ves. 215, 223; *Grimson* v. *Eyre* (1804), 9 Ves. 341, 346; *Kelly* v. *Hooper* (1841), 1 Y. & C. 197, 199; *Colburn* v. *Simms* (1843), 2 Hare, 543.

§ 6 (1). profits must be apportioned according to the relative value of the piratical with the non-piratical matter.

Delivery up. (4) Delivery up.

If proceedings are taken under sect. 7, delivery up may be claimed and the copies may be appropriated to the plaintiff for his own use. Apart from this section, the Court has jurisdiction in all cases of infringement to order the delivery up of infringements for destruction or cancellation of the infringing parts (*y*).

Accounts. (5) Accounts.

The usual claim is for "proper accounts," and where the plaintiff is successful in establishing an infringement, he is entitled to accounts showing the number of copies printed, the cost of production, the number of copies sold or distributed, and the proceeds from the sales, all properly vouched by vouchers and affidavits. The plaintiff is entitled to an order for all proper accounts before he decides whether to claim damages or profits. If the accounts do not show a net profit equivalent to the loss which he believes that he has sustained, he may elect to claim damages and ask for an inquiry as to damages (*z*).

On an interlocutory application for an injunction the defendant may undertake to keep an account of profits until the trial; but, strictly, the right to an account depends on the right to an injunction, and will not be ordered where the case for an injunction fails (*a*).

§ 6 (2). (2) The costs of all parties in any proceedings in respect of the infringement (*b*) of copyright (*c*) shall be in the absolute discretion of the Court.

(*y*) *Warne* v. *Seebohm* (1888), 39 Ch. D. 73; *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652; *Kelly* v. *Hodge* (1873), 29 L. T. 387; *Emperor of Austria* v. *Day* (1861), 3 D. F. & J. 217; *Hole* v. *Bradbury* (1879), 12 Ch. D. 886; *Delfe* v. *Delamotte* (1857), 3 K. & J. 581; *Stannard* v. *Harrison* (1871), 19 W. R. 811; *Colburn* v. *Simms* (1843), 2 Hare, 543.

(*z*) *Mawman* v. *Tegg* (1826), 2 Russ. 385, 400.

(*a*) *Baily* v. *Taylor* (1829), 1 Russ. & M. 73; *Price's Patent Candles* v. *Bauwen* (1858), 4 K. & J. 727; *Delondre* v. *Shaw* (1828), 2 Sim. 240; *Sweet* v. *Maugham* (1840), 11 Sim. 51.

(*b*) Sect. 2.

(*c*) Sect. 1 (2).

§ 6 (2).

Meaning of "absolute discretion of the Court."

Under the Rules of the Supreme Court, the costs of and incident to all proceedings are, except in certain specified cases, in the discretion of the Court. Where an action is tried by jury, the costs follow the event, unless the Court shall, for good cause, otherwise order. Under these rules it has been held that the discretion of the Court must be exercised judicially, and that a successful litigant cannot be deprived of costs merely by reason of some caprice on the part of the judge (*d*). The Court must be guided by principle in determining how the costs shall be borne (*e*). If it appears that a judge has not exercised his discretion, or has decided upon grounds which were not open to him, his order may be set aside by the Court of Appeal (*f*). The costs of any proceedings *primâ facie* follow the event, and unless the judge has materials upon which he can properly exercise his discretion to deprive the successful litigant of costs, such litigant ought to have an order for his costs (*f*).

Grounds on which plaintiff may be deprived of costs.

Grounds upon which a successful plaintiff may be deprived of his costs are that he had no cause of action which entitled him to any relief other than a declaratory judgment (*g*), that the relief obtained was trivial, and the action was not brought to settle any question of principle (*h*), that the action was commenced without reasonable warning and opportunity to the defendant to comply with the plaintiff's demand (*i*), that before the action was commenced the defendant offered substantially all the relief to which the plaintiff was entitled (*i*), that innocent agents such as printers and publishers were unnecessarily joined as defendants in the action (*k*), or that the plaintiff otherwise acted harshly or oppressively (*l*). The mere fact that a litigant insists on his legal rights and declines to leave the matter to the judge to say what in the circumstances and apart from the strict legal rights

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(*d*) *Civil Service, &c.* v. *General Steam*, [1903] 2 K. B. 756.
(*e*) *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501.
(*f*) *Civil Service, &c.* v. *General Steam*, [1903] 2 K. B. 756.
(*g*) *Jenkins* v. *Price*, [1907] 2 Ch. 229; *Evans* v. *Levy*, [1910] 1 Ch. 452.
(*h*) *American Tobacco Co.* v. *Guest*, [1892] 1 Ch. 630; *Dicks* v. *Brooks* (1880), 15 Ch. D. 22.
(*i*) *Walter* v. *Steinkopff*, [1892] 3 Ch. 489.
(*k*) *Tredesca* v. *National Monthly* (1910), Cop. Cas. 1905—10, p. 272; The Times, February 7.
(*l*) *Wall* v. *Taylor* (1883), 11 Q. B. D. 102; *Maxwell* v. *Somerton* (1874), 22 W. R. 313.

§ 6 (2). of the parties should be done, is not a good ground for depriving him of his costs (*m*). Neither is the fact that a plaintiff has commenced proceedings without previous communication, or that the defendant was an innocent infringer, necessarily good ground for depriving the plaintiff of costs (*n*). When the action is one that, in the opinion of the judge, ought to have been brought in a county court, he may give a successful plaintiff costs upon that scale only (*o*).

Grounds on which defendant may be deprived of costs.

A successful defendant may be refused his costs if he has been guilty of improper conduct of his case (*p*). If the defendant has brought the action on himself by his own indiscretion, he may be refused costs, as where he has allowed his name to be associated with a book as printer or publisher, although in fact he has not printed the book or caused it to be printed (*q*). Costs have also been refused to a successful defendant because he had made an illiberal use of the plaintiff's work without acknowledgment (*r*), or because he succeeded upon a technical point only (*s*).

Cost of issues.

Where a party is generally successful, but fails upon some distinct issue raised in the case, he will, as a rule, be entitled to the general costs of the action, but the other party will get the costs of the issue or issues on which he has been successful (*t*).

Decision of judge on question of costs not appealable.

Probably, the only effect of this sub-section is to make the order of the judge as to costs unappealable. A judge ought to apply a judicial mind to the question of costs, and should only deprive a successful party of costs upon grounds similar to those upon which the judges now act in exercising their discretion under the rules of Court.

(*m*) *Civil Service, &c.* v. *General Steam*, [1903] 2 K. B. 756.

(*n*) *Wittman* v. *Oppenheim* (1884), 27 Ch. D. 260; *Smith* v. *Daily News* (1910), Cop. Cas. 1905-10, p. 302, The Times, December 2.

(*o*) *Clarke* v. *Midland Express* (1908), Cop. Cas. 1905-10, p. 139.

(*p*) *Cobbett* v. *Woodward* (1872), L. R. 14 Eq. 407, 414; *Maple* v. *Junior Army and Navy Stores* (1882), 21 Ch. D. 369, 373; *Piddington* v. *Philip* (1893), 14 N. S. W. R. Eq. 159.

(*q*) *Kelly's Directories* v. *Gavin & Lloyds*, [1901] 1 Ch. 374; *Booth* v. *Edward Lloyd* (1910), 26 T. L. R. 549.

(*r*) *Pike* v. *Nicholas* (1869), L. R. 5 Ch. 251; *Cobbett* v. *Woodward* (1872), L. R. 14 Eq. 407.

(*s*) *Liverpool General Brokers* v. *Commercial Press*, [1897] 2 Q. B. 1.

(*t*) *Metzler* v. *Wood* (1878), 8 Ch. D. 606; *Page* v. *Wisden* (1869), 20 L. T. 435.

On the other hand, as the discretion is stated to be absolute, it would seem that, however capriciously a judge does in fact act, no appeal will lie against any order made by him as to costs. § 6 (2).

(3) In any action for infringement (*u*) of copyright (*x*) in any work, the work shall be presumed to be a work in which copyright subsists and the plaintiff shall be presumed to be the owner (*y*) of the copyright, unless the defendant puts in issue the existence of the copyright, or, as the case may be, the title of the plaintiff, and where any such question is in issue, then— § 6 (3).

(a) if a name purporting to be that of the author (*z*) of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the author of the work;

(b) if no name is so printed or indicated, or if the name so printed or indicated is not the author's true name or the name by which he is commonly known, and a name purporting to be that of the publisher or proprietor of the work is printed or otherwise indicated thereon in the usual manner, the person whose name is so printed or indicated shall, unless the contrary is proved, be presumed to be the owner

(*u*) Sect. 2.
(*y*) Sect. 5.
(*x*) Sect. 1 (2).
(*z*) Sects. 16 (2), 19 (1), 21.

§ 6 (3).

of the copyright in the work for the purposes of proceedings in respect of the infringement of copyright therein.

Abolition of registration.

This provision becomes necessary by reason of the abolition of registration and of the *primâ facie* proof of copyright which the certificate of registration now affords.

Specific denial of title in affidavit or defence.

The first paragraph goes to the question of pleading, and requires a defendant specifically to deny either the existence of the copyright or the plaintiff's proprietorship thereof if he intends to rely on such a defence. It will be observed that a defendant is no longer called upon to allege who the true proprietor is. He may put the plaintiff's title in issue by a simple denial that the plaintiff is the proprietor.

The provision is so framed as to apply equally to a motion for an interim injunction and to the trial of the action. In the first case the defendant must take the objection in his affidavit and in the second in his defence.

Primâ facie proof of title, presumption in favour of author named on work.

If the author's name is indicated on the work as such, then if the plaintiff be not the author, he must trace his title from the author either by evidence of employment within sect. 5 (1) or by a written assignment or assignments within sect. 5 (2). It does not appear to be necessary that the name shall be indicated on every copy of the work; that is to say, it will be *primâ facie* proof of authorship to put in evidence a copy of the work with the author's name indicated thereon in the usual manner, and such proof will not be rebutted merely by the defendant putting in evidence a copy with no author's name indicated thereon, and proving that if there was copying it must have been copying from such a copy.

Whether author's name on manuscript sufficient.

It would even appear to be permissible in the case of a book to put in evidence the author's manuscript from which the book was printed, and if the author's name appears as such on the manuscript that will be *primâ facie* proof of authorship, and such proof will not be rebutted merely by showing that the author's true name was not printed on any published copy.

Author's name inserted *ad hoc*.

On the other hand, it would seem that evidence under this section cannot be manufactured for the purpose of

the trial, and that the *primâ facie* proof afforded by putting in a copy of the work with the author's name indicated thereon would be rebutted by the defendant showing that the name had been put on solely for the purpose of the litigation. The author's name must be indicated in the usual manner, and that would seem to imply that it must have been put on at or about the time the work or the copy thereof in question was made.

Author's *nom de plume* is sufficient.

It will be observed that the author's name may be a *nom de plume* by which he is commonly known *qua* author. It will not matter that, in private life, he is known by his true name. All that will be necessary will be to call evidence to prove the identity of the plaintiff or his assignor, as the case may be, with the name which is indicated on the work.

In case of work posthumously published.

Where an author has disposed of his unpublished manuscript by his will, there is a presumption that the copyright passes with the property in the manuscript (*a*). If, therefore, it is shown that a work was published posthumously, the plaintiff may prove his title either by assignment from the author or from some person who acquired the manuscript under the author's testamentary disposition.

Presumption in favour of publisher or proprietor named on work.

Paragraph (b) of the sub-section is applicable when there is no proof under paragraph (a). If any copy of the work is put in evidence bearing the author's true name, or the name by which he is commonly known, it will displace any presumption which might otherwise have arisen from the putting in evidence of a copy upon which the publisher's or proprietor's name alone appears. In the case therefore of collective works, proof under paragraph (b) is not available when the matter pirated is a signed contribution. It is only available to prove title to matter which is unidentified as regards authorship. A proprietor of a collective work has, however, a copyright in the collection of material as well as in the separate articles, and although he might not be able to sue in respect of infringement of the articles taken separately, he might, if the collection was reproduced, be able to sue in respect of infringement of the copyright in the collection.

(*a*) Sect. 17 (2).

§ 6 (3).

Question where work is issued consecutively by two or more publishers or proprietors.

Difficulty might arise where the property in a work has changed hands, and the work, after having been issued in the name of one publisher or proprietor, is then issued in the name of another publisher or proprietor. If two copies are put in evidence, one in the name of one publisher and the other in the name of another, then the presumption will arise in favour of the publisher named on the copy which was first published, and it is submitted that if the publisher named on the copy more recently published desires to have the benefit of the presumption, he must trace his title from the publisher named on the copy which was first published.

Existing law.—A certified copy of an accurate entry in the Book of Registry at Stationers' Hall is *primâ facie* proof of the copyright as therein recorded. This applies to copyright in books (*b*) (including the title of the proprietor of a collective work under the provision of sect. 18 of the Copyright Act, 1842 (*c*)), performing right in plays and music (*d*), and copyright in paintings, drawings, and photographs (*e*). It does not apply to copyright in engravings or sculpture in respect of which no provision is made for *primâ facie* proof of title.

§ 7.

Rights of owner against persons possessing or dealing with infringing copies, &c.

7. All infringing copies (*f*) of any work in which copyright (*g*) subsists, or of any substantial part thereof, and all plates (*h*) used or intended to be used for the production of such infringing copies, shall be deemed to be the property of the owner (*i*) of the copyright, who accordingly may take proceedings for the recovery of the possession thereof or in respect of the conversion thereof.

Scope of section.

This section provides a very valuable remedy in the case of infringement of copyright. If the infringements

(*b*) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 11.
(*c*) *Black* v. *Imperial Book Co.* (1904), 8 Ont. L. R. 9; Cop. Cas. 1901-4, p. 82.
(*d*) Copyright Act, 1842 (5 & 6 Vict. c. 45), s. 20; *Hardacre* v. *Armstrong* 1905), Cop. Cas. 1905-10, p. 3
(*e*) Fine Arts Copyright Act, 1862 (25 & 26 Vict. c. 68), ss. 4, 5.
(*f*) Sect. 35 (1) ("Infringing").
(*g*) Sect. 1 (2).
(*h*) Sect. 35 (1) ("Plates").
(*i*) Sect. 5.

§ 7.

are "infringing copies," this section enables a plaintiff to recover the gross proceeds of the sales of infringements instead of only actual damages or net profits. It also entitles the plaintiff to delivery up of copies for his own use, and not merely for cancellation or destruction.

Meaning of "infringing copies."

The definition section of the Act provides that, "'Infringing,' when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made or imported in contravention of the provisions of this Act." Two questions of the utmost importance arise: (1) what is the scope of the word "copy"; is it conterminous with the word "infringement," or has it a narrower meaning? and (2) what "copies" are to be deemed "infringing copies"?

Copy.

As to the scope of the word "copy," it seems to be clear that any reproduction of any part of a work in any material form is not necessarily a copy. "Copy" will include the copy of a substantial part of a work infringed, and will also include a colourable imitation of the whole, or any part of a work infringed. It is submitted, however, that, where copyright is infringed by a derivative work of an entirely different order from the original work, the infringing work is not a copy or colourable imitation so as to come within the provisions of this section. The following derivative works are, it is submitted, not copies or colourable imitations of the works from which they are derived (*k*):—

> A reproduction in the flat of works executed in three dimensions, such as works of sculpture and architecture.
>
> A reproduction in three dimensions of works executed in the flat.
>
> A reproduction of a literary, dramatic, or musical work on a record or perforated roll designed for its acoustic representation.
>
> A reproduction of a literary or dramatic work in the form of a cinematograph film.

On the other hand, it is submitted that the following derivative works, being works of the same order or class

(*k*) *Vide ante*, pp. 14, 15.

§ 7. as those from which they are derived, are to be deemed copies or colourable imitations:—

A translation of a literary work.
A dramatised version of a non-dramatic work.
A non-dramatic version of a dramatic work.
An abridgment of a literary work.
An engraving or sketch taken from a painting.

Infringing. If a reproduction is a copy or colourable imitation of the whole or part of a work, then it is an infringing copy if it is made or imported in contravention of the provisions of the Act, that is to say, if it is (1) made in contravention of the exclusive right of production conferred by sect. 1; (2) imported in contravention of sect. 2 (2), that is, with knowledge that it would have infringed copyright if made in that part of the dominions into which it is imported; or (3) imported in contravention of sect. 14, that is, a copy imported into the United Kingdom which, if made in the United Kingdom, would have infringed copyright, and as to which notice has been given to the Commissioners of Customs.

Question whether innocence affords any defence. It will be observed that proceedings under this section may be taken against any person who has obtained possession of an infringing copy, and it is not necessary to show that the defendant has infringed copyright within the meaning of sect. 2. He may be quite innocent of infringement and have no knowledge of infringement. It is submitted that the provisions of sect. 8 do not apply to an action brought under sect. 7. Such an action is not brought in respect of infringement of copyright, but in respect of the detinue or conversion of the plaintiff's property. The fact that the copies became the plaintiff's property because they were infringing copies does not affect the character of the action brought against the person who has such copies in his possession. It is submitted that the defendant, in an action of trover or conversion under this section, cannot escape liability on the ground that he was not aware, and had not means of making himself aware, that copyright subsisted in the plaintiff's work.

Conversion. In so far as the defendant has had possession of the copies and parted with them, an action lies for conversion

for their full value, and the cause of action in respect of each copy arises at the date of conversion (*l*).

Trover.

In so far as the defendant is in possession of the copies when action is brought, the action is an action of trover, and the cause of action arises when demand is made for delivery up (*m*). Such demand should always, therefore, be made before the writ is issued.

Question whether three years limitation applies.

If, as is submitted, an action under this section is not an action in respect of infringement of copyright, it follows that the three years limitation does not apply. In so far as the action is one of conversion, an action of damages can be brought in respect of all copies disposed of within the period of six years before the issue of the writ. In so far as the action is one of trover, the action can be brought at any time within six years after the plaintiff has demanded that the copies shall be delivered up to him.

Question whether *primâ facie* proof of title applies.

It also follows that sect. 6 of the Act does not apply to an action brought under this section, and therefore the plaintiff must prove his title irrespective of the statutory presumption afforded by the name of author, proprietor or publisher on the work. Apart, however, from such presumption, it would probably not be necessary in every case to prove affirmatively that the reputed author of a book did in fact write it. In a case of a dramatic piece which was not registered, and therefore as to which there was no presumption of title, it was held that the plaintiff made out a *primâ facie* title to the performing right by producing a written assignment from a person purporting to be the author, and proving that he had repeatedly asserted his right against others (*n*).

Existing law.—Under sect. 23 of the Copyright Act, 1842, infringing copies are deemed to be the property of the proprietor of the copyright, and he can sue to recover the same or for damages for conversion. The section applies not only to reprints, but to cases where part only of the copyright work has been taken (*o*). A demand in writing is a condition precedent to the right of action

(*l*) *Hollins* v. *Fowler* (1875), L. R. 7 H. L. 757.
(*m*) *Miller* v. *Dell*, [1891] 1 Q. B. 468.
(*n*) *Hardacre* v. *Armstrong* (1) (1904), Cop. Cas. 1905-10; The Times, October 27.
(*o*) *Boosey* v. *Wright* (No. 2) (1899), 81 L. T. 265; *Rooney* v. *Kelly* (1861), 14 Ir. C. L. R. 158, 171.

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accruing under this section. After some difference of opinion, it was held that the section applied even although the proprietor of the copyright was not registered at the date of the infringement (*p*). It is only necessary, therefore, that he should be registered before the issue of the writ. It is doubtful whether the twelve months' limitation applies to such action, or whether the only limitation is six years from the date when the cause of action in conversion or detinue arises (*q*).

§ 8.

Exemption of innocent infringer from liability to pay damages, &c.

8. Where proceedings are taken in respect of the infringement (*r*) of the copyright (*s*) in any work and the defendant in his defence alleges that he was not aware of the existence of the copyright in the work, the plaintiff shall not be entitled to any remedy (*t*) other than an injunction or interdict in respect of the infringement if the defendant proves that at the date of the infringement he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

Who may plead the section; question of innocent publisher and guilty author.

The precise meaning or effect of this section is very difficult to determine. It appears to contemplate the case of proceedings being taken against the actual author of an infringement, and such author being able to show that he was unaware and had no reasonable grounds for suspecting that copyright subsisted in the work which he had reproduced or copied from. The kind of case contemplated will occur where a work is published anonymously or pseudonymously, and it is impossible to ascertain whether the copyright has or has not expired. It is conceived that in cases of this kind the section will protect the actual author of the infringement and all those subse-

(*p*) *Hole* v. *Bradbury* (1879), 12 Ch. D. 886; *Isaacs* v. *Fiddemann* (1880), 49 L. J. Ch. 412; *Boosey* v. *Whight* (No. 2) (1899), 81 L. T. 265.

(*q*) *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444; *Weldon* v. *Dicks* (1878), 10 Ch. D. 247, 262; *Muddock* v. *Blackwood*, [1898] 1 Ch. 58; *Black* v. *Imperial Book Co.* (1904), 8 Ont. L. R. 9.

(*r*) Sect. 2.

(*s*) Sect. 1 (2).

(*t*) Sect. 6 (1).

quently dealing with the work, such as publishers and printers, even although they have acted without any knowledge that the work which they published or printed was reproduced or copied from the copyright work. On the other hand, it is conceived that if the actual author of the infringement knew, or had reasonable ground for suspecting, that copyright subsisted in the work which he has copied, the publisher or printer cannot take refuge as an innocent infringer under the clause merely because he was unaware that the author had in fact copied from the copyright work. In short, in the application of this section to the case of defendants other than the actual author of the infringement, it must be assumed that they knew that the work was copied from the copyright work, and they can only set up this section in defence to a claim for damages if upon that assumption they can show that they were not aware, and had no reasonable ground for suspecting that copyright subsisted in the copyright work.

Question of indirect copying by innocent author.

Similarly, where the actual author of an infringing work has infringed the copyright work by copying from it indirectly through the medium of a third work, it is submitted that the mere fact that he was ignorant that he was copying from the copyright work is not enough to entitle him to plead this section. For the purpose of this section it must be assumed that he knew he was copying from the copyright work, and he can only set up this section in defence if upon that assumption it can be said that he was not aware and had no reasonable ground for suspecting that copyright subsisted in the work.

Question whether this section applies to proceedings under sect. 8

It has already been submitted that this section will not protect a defendant from proceedings taken under sect. 7 for delivery up of copies or damages for conversion. Such proceedings would not be brought to recover damages in respect of an infringement of copyright, but in respect of the unlawful detention of the plaintiff's property.

Existing law.—Ignorance of the existence of copyright, or of the plaintiff's title, affords no defence to an action for infringement. It is no defence to show that the copying was indirect through a third publication without knowledge that the matter taken was part of the plaintiff's work (*u*), or that the defendant

(*u*) *Murray* v. *Bogue* (1852), 1 Drew. 353; *Reade* v. *Lacey* (1861), 1 J. & H. 524; *Reade* v. *Conquest* (1862), 11 C. B. N. S. 479; *Cate* v. *Devon, &c.*

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believed he had the plaintiff's licence, if the person who purported to grant the licence as the plaintiff's agent had, in fact, no authority (*x*). Innocent printers and publishers without any knowledge of the source of the work which they print are liable for infringement (*y*). Common law rights (*z*), copyright and playright, are all in the nature of an absolute right of property, and any trespasser is liable in damages. Innocence only goes to the question of costs, or it may influence the discretion of the Court in granting equitable remedies (*a*). Actors who innocently take part in the unauthorized performance of a dramatic piece are liable to penalties under the Dramatic Copyright Act, 1833 (*b*). As regards acts which are not a direct invasion of the monopoly, but only incidental thereto, such as importing or selling infringing copies, persons who innocently do such acts are liable, except in so far as the terms of the statute specify knowledge as part of the offence (*c*).

§ 9. Restriction on remedies in the case of architecture.

9.—(1) Where the construction of a building or other structure which infringes (*d*) or which, if completed, would infringe the copyright (*e*) in some other work has been commenced, the owner (*f*) of the copyright shall not be entitled to obtain an injunction or interdict to restrain the construction of such building or structure or to order its demolition.

(2) Such of the other provisions of this Act as provide that an infringing copy (*g*) of a work

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Co. (1889), 40 Ch. D. 500; *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501; *Chatterton* v. *Cave* (1878), 3 A. C. 483, 501; *Novello* v. *Sudlow* (1852), 12 C. B. 177; *Rock* v. *Lazarus* (1872), L. R. 15 Eq. 104; *Lee* v. *Simpson* (1847), 3 C. B. 871.

(*x*) *Heinemann* v. *Smart Set Publishing Co.* (1909), Cop. Cas. 1905-10, p. 221; The Times, July 15.

(*y*) *Kelly's Directories* v. *Gavin and Lloyds*, [1901] 1 Ch. 374; *Colburn* v. *Simms* (1843), 2 Hare, 543; *Baschet* v. *London Illustrated*, [1900] 1 Ch. 73; *Smith* v. *Daily News, Ltd.* (1910), Cop. Cas. 1905-10, p. 302; The Times, December 2.

(*z*) *Mansell* v. *Valley Printing Co.*, [1908] 2 Ch. 441; *Prince Albert* v. *Strange* (1849), 2 De G. & Sm. 652, 688.

(*a*) *Tredesco* v. *National Monthly* (1910), Cop. Cas. 1905-10, p. 272.

(*b*) *Duck* v. *Mayeu* (1892), 8 T. L. R. 339.

(*c*) *Hanfstaengl* v. *W. H. Smith & Sons*, [1905] 1 Ch. 519.

(*d*) Sect. 2.

(*e*) Sect. 1 (2).

(*f*) Sect. 5.

(*g*) Sect. 35 (1) ("Infringing").

shall be deemed to be the property of the owner of the copyright (*h*), or as impose summary penalties (*i*), shall not apply in any case to which this section applies.

Nature of protection given to architects.

The extension of copyright protection so as to include the sole right of constructing a building where the design is novel and artistic is conferred by this Act for the first time. An architect's plans were protected under the Fine Arts Copyright Act, 1862, as drawings, and the architect could prevent the reproduction of his plans, or of any novel artistic feature contained therein, upon other plans either directly or indirectly. Under this Act the construction of a building may be an infringement of the architect's copyright.

The inclusion of architecture as a specific subject of protection follows upon its inclusion in the Berlin Convention as a subject for which international protection is demanded. The idea of extending copyright to architecture in this country was, however, very strenuously resisted. A considerable body of evidence was taken on the subject before the departmental committee, presided over by Lord Gorell, and the committee by a majority decided that architecture should be included. The dissentients were Mr. Justice Scrutton, Mr. Trevor Williams, and Mr. Joynson Hicks, who thought that the difficulties of trying cases of alleged infringement would be so great that the architects would be no better off than they are at present. The tendency to hamper the development of the architectural art was also put forward as an objection to the granting of copyright. In the House of Commons architecture only got through Grand Committee by a small majority, and through the House of Commons on the report stage by the assistance of the Government whips. As a result of the strenuous opposition to the principle of protecting architecture, the architects had to be content with a considerably modified protection, and this section will make the architects' rights extremely shadowy in perhaps most cases of infringement. The defendant will be able to resist an injunction in so far

(*h*) Sect. 7. (*i*) Sects. 11—13.

§ 9. as the building then in course of construction is concerned, and if he can establish that he is an innocent infringer within the meaning of sect. 8 he will be able to resist a claim for any relief other than an injunction; that is to say, if the infringer immediately gives his undertaking not to erect any other building which will infringe the plaintiff's copyright, the plaintiff will be entitled to no further relief.

§ 10. Limitation of actions.

10. An action in respect of infringement (*k*) of copyright (*l*) shall not be commenced after the expiration of three years next after the infringement.

Time from which limitation runs.

Infringement includes selling or otherwise dealing with an infringement contrary to the provisions of sect. 2 (2). The period of limitation commences therefore to run afresh in the case of each repetition of the offence of selling, &c. (*m*).

Question whether limitation applies to proceedings under sect. 7.

It is doubtful whether the section applies to proceedings taken under sect. 7 for delivery up, or damages for conversion. Such proceedings would not be taken in respect of infringement of copyright, but in respect of the detention or conversion of the plaintiff's property, and, it is submitted, would not be barred until six years after the conversion, or in the case of copies still in the defendant's possession, until six years after a formal demand for delivery up.

Existing law.—Under the Copyright Act, 1842, s. 26, all actions "for any offence that shall be committed against this Act" must be commenced within twelve calendar months next after the offence committed. It is doubtful whether this limitation applies to any action except an action for penalties (*n*). In one case Kekewich, J., gave judgment for damages under sect. 23 in respect of sales dating back ten years before the issue of the writ (*o*). In Canada it has

(*k*) Sect. 2.

(*l*) Sect. 1 (2).

(*m*) *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444; *Macmillan* v. *Suresh Chunder Deb* (1890), Ind. L. R. 17 Calc. 951.

(*n*) *Hogg* v. *Scott* (1874), L. R. 18 Eq. 444; *Stewart* v. *Black* (1846), 9 D. 1026; *Weldon* v. *Dicks* (1878), 10 Ch. D. 247, 262; *Clark* v. *Bell* (1804), Mor. Dic., "Literary Property," App. 9.

(*o*) *Muddock* v. *Blackwood*, [1898] 1 Ch. 58.

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been held that the limitation does apply to a claim for damages under sect. 23 (*p*). Actions for infringement of performing right in dramatic or musical works must also be brought within twelve months after the offence has been committed (*q*). An action or other proceeding for the recovery of penalties under the Engraving Copyright Acts, must be commenced before the expiration of three months from the discovery of the offence and before the expiration of six months from the time it was committed (*r*). Actions for damages for infringement of copyright in an engraving may be commenced any time within six years after the infringement (*s*). An action in respect of any infringement of copyright in sculpture must be commenced before the expiration of six months from the discovery of the offence complained of, and within six years from the date when it was committed (*t*). The Artistic Copyright Act, 1862, contains no provision limiting the time within which action must be brought, and any proceedings, whether for penalties or damages under that Act, may be brought at any time within the period of six years provided by the Statute of Limitations.

(*p*) *Black* v. *Imperial Book Co.* (1904), 8 Ont. L. R. 9.

(*q*) Dramatic Copyright Act, 1833 (3 & 4 Will. IV. c. 15), s. 3.

(*r*) Engraving Copyright Act, 1734 (8 Geo. II. c. 13), s. 3; Engraving Copyright Act, 1766 (7 Geo. III. c. 38), s. 6.

(*s*) 16 Jac. I. c. 16, s. 3.

(*t*) Sculpture Copyright Act, 1814 (54 Geo. III. c. 56), s. 5; 16 Jac. I. c. 16, s. 3.

Summary Remedies.

§ 11.

Penalties for dealing with infringing copies, &c.

11.—(1) If any person knowingly—

(a) makes for sale or hire any infringing copy (*a*) of a work in which copyright subsists (*b*); or

(b) sells (*c*) or lets for hire, or by way of trade exposes or offers (*d*) for sale or hire any infringing copy of any such work; or

(c) distributes infringing copies of any such work either for the purposes of trade or to such an extent as to affect prejudicially the owner of the copyright; or

(d) by way of trade exhibits in public any infringing copy of any such work; or

(e) imports (*e*) for sale or hire into the United Kingdom any infringing copy of any such work:

he shall be guilty of an offence under this Act and be liable on summary conviction to a fine not exceeding forty shillings for every copy dealt with in contravention of this section, but not

(*a*) Sect. 35 (1) ("Infringing").
(*b*) Sect. 1.
(*c*) *Vide supra*, p. 40.
(*d*) *Vide supra*, p. 40.
(*e*) *Vide supra*, p. 40.

exceeding fifty pounds in respect of the same transaction; or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months. § 11 (1).

(2) If any person knowingly makes or has in his possession any plate (*f*) for the purpose of making infringing copies of any work in which copyright subsists, or knowingly and for his private profit causes any such work to be performed (*g*) in public (*h*) without the consent of the owner of the copyright, he shall be guilty of an offence under this Act, and be liable on summary conviction to a fine not exceeding fifty pounds, or, in the case of a second or subsequent offence, either to such fine or to imprisonment with or without hard labour for a term not exceeding two months.

(3) The Court before which any such proceedings are taken may, whether the alleged offender is convicted or not, order that all copies of the work or all plates in the possession of the alleged offender, which appear to it to be infringing copies or plates for the purpose of making infringing copies, be destroyed or delivered up to the owner of the copyright or otherwise dealt with as the Court may think fit.

(4) Nothing in this section shall, as respects musical works, affect the provisions of the Musical 2 Edw. 7. c. 15. 6 Edw. 7. c. 36.

(*f*) Sect. 35 (1) ("Plate").
(*g*) Sects. 2 (1) (vi), 35 (1) ("Performance").
(*h*) *Vide supra*, p. 16.

§ 11 (4). (Summary Proceedings) Copyright Act, 1902, or the Musical Copyright Act, 1906.

Scope of the section.

This section deals with criminal proceedings as distinguished from the civil proceedings dealt with in the foregoing sections. The section represents an extension to other works, literary or artistic, of the principles of the Musical (Summary Proceedings) Copyright Acts, 1902 and 1906. The original proposal was to consolidate the whole of the provisions in these two Acts, and to apply them *in toto* to all classes of works. This proposal was, however, strenuously opposed when the Bill was in Grand Committee, and as a compromise, musical works were left *in statu quo* under the above-mentioned Acts, which are not repealed, and the principle of summary procedure was applied to other works in the much less drastic form in which it appears in this section.

"Infringing copies."

It is not every work infringing copyright that may be seized under this section, but only works which are "infringing copies." The meaning of infringing copies has already been considered in dealing with the civil procedure under sect. 7. Copy for this purpose includes "colourable imitation," but, as has been submitted, it does not include reproductions of the work in an entirely different material form, such as the reproduction of sheet music on a record. It will be observed that the meaning of "infringing copy" in this section is not identical with its meaning in sect. 7, because in the earlier section it is expressly stated that a copy of any substantial part may be an infringing copy. The words "substantial part," although used in sects. 1 and 7, are omitted here, and as this is a penal section, the obvious inference is that the taking of part only is not enough, and that there must therefore be a copy of substantially the whole work in order to support a conviction under this section. It is submitted that a translation or dramatic version of a novel would not be an infringing copy under this section. The case of an engraving or photograph from a picture is much nearer being a copy of the entire work, and on the whole, it is submitted, would come within the section.

Alleged offender must be

It will be observed that under this section there is no power of seizing suspect works and bringing them before

a magistrate, nor is there any power of arresting a suspected offender or searching premises where it is believed that an offence is being committed. The alleged offender can only be brought before the Court if he can be duly served with a summons, and the alleged infringing copies can only be seized and forfeited if upon the hearing of such summons it is proved that the copies are in fact infringing copies (*i*).

served with summons.

The most valuable part of this section is probably that contained in sub-sect. (2), which provides that a person who for private profit causes an unauthorised public performance of a copyright work may be proceeded against in a summary manner under this section. This ought to be valuable in suppressing the unauthorised performance of plays by small touring companies which were seldom worth the powder and shot of civil proceedings. It may be noted that on a strict construction of the Act, performance under this sub-section would include the reading or recitation by one person of a reasonable extract from a published work. Although by sect. 2 (1) (vi.) such a performance is not an infringement of copyright for the purposes of a civil action, yet there is no saving clause which would take it out of this sub-section and exempt the performer from criminal proceedings.

Application of summary remedies to infringement of performing rights.

The penalties awarded by the Court under this section or under the Musical (Summary Proceedings) Copyright Acts are purely penal, and are not applied as compensation for the benefit of the copyright owner. The only personal benefit which the owner of the copyright may get by taking summary proceedings is from an order of the Court that the infringing copies be delivered up to him.

Owner of copyright not entitled to penalties for his own use.

The following is the full text of the Musical (Summary Proceedings) Copyright Act, 1902 (*k*):—

Musical (Summary Proceedings) Copyright Act.

An Act to amend the Law relating to Musical Copyright. [22nd July 1902.]

BE it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in

(*i*) *Francis, Ex parte* (No. 1), [1903] 1 K. B. 275.
(*k*) 2 Edw. VII. c. 15.

§ 11.

this present Parliament assembled, and by the authority of the same, as follows:

Seizure, &c. of pirated copies.

1. A court of summary jurisdiction, upon the application of the owner of the copyright in any musical work, may act as follows: If satisfied by evidence that there is reasonable ground for believing that pirated copies of such musical work are being hawked, carried about, sold, or offered for sale, may, by order, authorise a constable to seize such copies without warrant and to bring them before the court, and the court, on proof that the copies are pirated, may order them to be destroyed or to be delivered up to the owner of the copyright if he makes application for that delivery.

Power to seize copies on hawkers.

2. If any person shall hawk, carry about, sell, or offer for sale any pirated copy of any musical work, every such pirated copy may be seized by any constable without warrant, on the request in writing of the apparent owner of the copyright in such work, or of his agent thereto authorised in writing, and at the risk of such owner.

On seizure of any such copies, they shall be conveyed by such constable before a court of summary jurisdiction, and, on proof that they are infringements of copyright, shall be forfeited or destroyed, or otherwise dealt with as the court may think fit.

Definitions.

3. "Musical copyright" means the exclusive right of the owner of such copyright under the Copyright Acts in force for the time being to do or to authorise another person to do all or any of the following things in respect of a musical work:—

(1) To make copies by writing or otherwise of such musical work.
(2) To abridge such musical work.
(3) To make any new adaptation, arrangement, or setting of such musical work, or of the melody thereof, in any notation or system.

"Musical work" means any combination of melody and harmony, or either of them, printed,

reduced to writing, or otherwise graphically produced or reproduced.

"Pirated musical work" means any musical work written, printed, or otherwise reproduced, without the consent lawfully given by the owner of the copyright in such musical work.

Short title and commencement.

4. This Act may be cited as the Musical (Summary Proceedings) Copyright Act, 1902, and shall come into operation on the first day of October one thousand nine hundred and two, and shall apply only to the United Kingdom.

Judicial decisions under the above Act.

It will be observed that the above Act was directed solely to the seizure of suspected copies, and that it contained no provision which enabled any conviction to be obtained against the person of the hawker or other vendor. Even as a means of getting possession of the infringing copies, it proved extremely defective. In the first place, it was held that, although the copies might be seized from a hawker and brought before the Court, the Court had no power to make any order in respect of them until the person from whom they were seized was notified by summons (*l*). In the second place, where copies were suspected to be stored and sold to dealers and hawkers upon private premises, there was no power of search or forcible entry, and although the Court might authorise a constable to seize such copies, the constable could not execute the order unless he could obtain access to the premises with the consent of the proprietor (*m*).

Perforated roll not a pirated copy.

It was held that a perforated roll for the pianola was not a "pirated copy of a musical work" within the meaning of the above Act, and that such rolls could not be seized or forfeited (*n*).

Musical Copyright Act, 1906.

The Musical Copyright Act, 1906 (*o*), was passed to remedy some of the defects in the Act of 1902. It made it an offence punishable upon summary conviction by fine or imprisonment, to print, reproduce, sell, or expose, offer, or have in possession for sale any pirated copy of

(*l*) *Francis, Ex parte* (No. 1), [1903] 1 K. B. 275.
(*m*) *Francis, Ex parte* (No. 2) [1903], 88 L. T. 806.
(*n*) *Mabe* v. *Connor*, [1909] 1 K. B. 515.
(*o*) 6 Edw. VII. c. 36.

§ 11. any musical work, or any plate for the reproduction thereof. It also provided for the taking into custody of an alleged offender, and for the granting of a search warrant in respect of suspected premises. The following is the full text of the Act:—

An Act to amend the law relating to Musical Copyright. [4th August 1906.]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Penalty for being in possession of pirated music.

1.—(1.) Every person who prints, reproduces, or sells, or exposes, offers, or has in his possession for sale, any pirated copies of any musical work, or has in his possession any plates for the purpose of printing or reproducing pirated copies of any musical work, shall (unless he proves that he acted innocently) be guilty of an offence punishable on summary conviction, and shall be liable to a fine not exceeding five pounds, and on a second or subsequent conviction to imprisonment with or without hard labour for a term not exceeding two months or to a fine not exceeding ten pounds: Provided that a person convicted of an offence under this Act who has not previously been convicted of such an offence, and who proves that the copies of the musical work in respect of which the offence was committed had printed on the title page thereof a name and address purporting to be that of the printer or publisher, shall not be liable to any penalty under this Act unless it is proved that the copies were to his knowledge pirated copies.

(2.) Any constable may take into custody without warrant any person who in any street or public place sells or exposes, offers, or has in his possession for sale any pirated copies of any such musical work as may be specified in any general written authority addressed to the chief officer of police, and signed by the apparent owner of the copyright in such work or his agent thereto authorised in

writing, requesting the arrest, at the risk of such owner, of all persons found committing offences under this section in respect of such work, or who offers for sale any pirated copies of any such specified musical work by personal canvass or by personally delivering advertisements or circulars.

(3) A copy of every written authority addressed to a chief officer of police under this section shall be open to inspection at all reasonable hours by any person without payment of any fee, and any person may take copies of or make extracts from any such authority.

(4) Any person aggrieved by a summary conviction under this section may in England or Ireland appeal to a court of quarter sessions, and in Scotland under and in terms of the Summary Prosecutions Appeals (Scotland) Act, 1875. 38 & 39 Vict. c. 62.

Right of entry by police for execution of Act.

2.—(1) If a court of summary jurisdiction is satisfied by information on oath that there is reasonable ground for suspecting that an offence against this Act is being committed on any premises, the court may grant a search warrant authorising the constable named therein to enter the premises between the hours of six of the clock in the morning and nine of the clock in the evening, and, if necessary, to use force for making such entry, whether by breaking open doors or otherwise, and to seize any copies of any musical work or any plates in respect of which he has reasonable ground for suspecting that an offence against this Act is being committed.

(2) All copies of any musical work and plates seized under this section shall be brought before a court of summary jurisdiction, and if proved to be pirated copies or plates intended to be used for the printing or reproduction of pirated copies shall be forfeited and destroyed or otherwise dealt with as the court think fit.

Definitions.

3. In this Act—

The expression "pirated copies" means any copies of any musical work written, printed, or otherwise reproduced without the con-

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sent lawfully given by the owner of the copyright in such musical work:

The expression "musical work" means a musical work in which there is a subsisting copyright:

The expression "plates" includes any stereotypo or other plates, stones, matrices, transfers, or negatives used or intended to be used for printing or reproducing copies of any musical work: Provided that the expressions "pirated copies" and "plates" shall not, for the purposes of this Act, be deemed to include perforated music rolls used for playing mechanical instruments, or records used for the reproduction of sound waves, or the matrices or other appliances by which such rolls or records respectively are made:

The expression "chief officer of police"—

(a) with respect to the City of London, means the Commissioner of City Police;

(b) elsewhere in England has the same meaning as in the Police Act, 1890;

53 & 54 Vict. c. 45.

(c) in Scotland has the same meaning as in the Police (Scotland) Act, 1890;

53 & 54 Vict. c. 67.

(d) In the police district of Dublin metropolis means either of the Commissioners of Police for the said district;

(e) elsewhere in Ireland means the District Inspector of the Royal Irish Constabulary:

The expression "court of summary jurisdiction" in Scotland means the sheriff or any magistrate of any royal, parliamentary, or police burgh officiating under the provisions of any local or general police Act.

Short title.

4. This Act may be cited as the Musical Copyright Act, 1906.

Alternative procedure by indictment.

Side by side with the summary remedies provided by this Act and the Musical (Summary Proceedings) Copyright Acts, 1902 and 1906, there is the more cumbersome procedure of indictment for conspiracy. If two or more

persons, publishers, printers, or hawkers, conspire to deprive the copyright owner of his property by printing and selling unauthorised copies, they commit a common law conspiracy (*q*). Several of the music pirates were dealt with in this way, and in the case of the street piracy of Oscar Wilde's *De Profundis*, the printers, publishers and hawkers were convicted and sentenced to varying terms of imprisonment up to nine months (*r*).

Under sects. 7 and 8 of the Fine Arts Copyright Act, 1862, penalties are imposed upon persons who commit certain offences in relation to paintings, drawings, and photographs. Although the rest of the Act is repealed, these sections are left standing, and thus form an addition to the sections of this Act dealing with summary remedies. The following is the text of the unrepealed sections:—

An Act for amending the law relating to Copyright in Works of the Fine Arts, and for repressing the Commission of Fraud in the Production and Sale of such Works. [29th July 1862.]

Penalties on fraudulent productions and sales.

7. No person shall do or cause to be done any or either of the following acts; that is to say,

First, no person shall fraudulently sign or otherwise affix, or fraudulently cause to be signed or otherwise affixed, to or upon any painting, drawing, or photograph, or the negative thereof, any name, initials, or monogram:

Secondly, no person shall fraudulently sell, publish, exhibit, or dispose of, or offer for sale, exhibition, or distribution, any painting, drawing, or photograph, or negative of a photograph, having thereon the name, initials, or monogram of a person who did not execute or make such work:

Thirdly, no person shall fraudulently utter, dispose of, or put off, or cause to be uttered or disposed of, any copy or colourable imitation of any painting, drawing, or photograph, or negative of a photograph, whether there shall

(*q*) *Rex* v. *Willetts* (1906), Cop. Cas. 1905-10, p. 27; The Times, January 20.

(*r*) *Rex* v. *Bokenham* (1910), Cop. Cas. 1905-10, p. 290.

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be subsisting copyright therein or not, as having been made or executed by the author or maker of the original work from which such copy or imitation shall have been taken:

Fourthly, where the author or maker of any painting, drawing, or photograph, or negative of a photograph, made either before or after the passing of this Act, shall have sold or otherwise parted with the possession of such work, if any alteration shall afterwards be made therein by any other person, by addition or otherwise, no person shall be at liberty, during the life of the author or maker of such work, without his consent, to make or knowingly to sell or publish, or offer for sale, such work or any copies of such work so altered as aforesaid, or of any part thereof, as or for the unaltered work of such author or maker:

Penalties.

Every offender under this section shall, upon conviction, forfeit to the person aggrieved a sum not exceeding ten pounds, or not exceeding double the full price, if any, at which all such copies, engravings, imitations, or altered works shall have been sold or offered for sale; and all such copies, engravings, imitations, or altered works shall be forfeited to the person, or the assigns or legal representatives of the person, whose name, initials, or monogram shall be so fraudulently signed or affixed thereto, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid: Provided always, that the penalties imposed by this section shall not be incurred unless the person whose name, initials, or monogram shall be so fraudulently signed or affixed, or to whom such spurious or altered work shall be so fraudulently or falsely ascribed as aforesaid, shall have been living at or within twenty years next before the time when the offence may have been committed.

Recovery of pecuniary penalties.

8. All pecuniary penalties which shall be incurred, and all such unlawful copies, imitations, and all other effects and things as shall have been

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forfeited by offenders, pursuant to this Act, may be recovered by the person herein-before empowered to recover the same respectively, and herein-after called the complainant or the complainer, as follows:

In England and Ireland, either by action against the party offending, or by summary proceeding before any two justices having jurisdiction where the party offending resides: In England and Ireland.

In Scotland by action before the Court of Session in ordinary form, or by summary action before the sheriff of the county where the offence may be committed or the offender resides, *who, upon proof of the offence or offences, either by confession of the party offending, or by the oath or affirmation of one or more credible witnesses, shall convict the offender, and find him liable to the penalty or penalties aforesaid, as also in expenses, and it shall be lawful for the sheriff in pronouncing such judgment for the penalty or penalties and costs, to insert in such judgment a warrant, in the event of such penalty or penalties and costs not being paid, to levy and recover the amount of the same by poinding: Provided always, that it shall be lawful to the sheriff, in the event of his dismissing the action and assoilzieing the defender, to find the complainer liable in expenses* (*r*), and any judgments so to be pronounced by the sheriff in such summary application shall be final and conclusive, and not subject to review by *advocation* (*r*), suspension, reduction, or otherwise. In Scotland.

The provisions in the above sections differ in their character from the provisions of sect. 11 of the new Act and from the provisions in the Musical (Summary Proceedings) Copyright Acts in that the penalties are not solely in the nature of a punishment, but may be recovered by the author of the work for his own use as compensation for the injury which he has suffered. It has been held that the penalties may be recovered either

(*r*) repealed (Stat. Law Rev. Act, 1893).

§ 11. in a civil action in the High Court or by way of summary proceedings as prescribed. If an action is brought in the High Court an injunction may be granted in respect of future offences (*s*).

In an action brought under sect. 7 (4) of the Fine Arts Copyright Act, 1862, for making copies of a drawing which had been altered in form and coloured without the artist's consent, it was held that a *bonâ fide* belief that he was entitled to make the alterations was no answer to the plaintiff's claim (*s*). The Court expressed the view that the colouring was an important element in arriving at a decision as to whether the work had been altered within the meaning of the section. It was open to doubt whether colouring alone amounted to an alteration (*s*).

Appeals to quarter sessions.

12. Any person aggrieved by a summary conviction of an offence under the foregoing provisions (*t*) of this Act may in England and Ireland appeal to a court of quarter sessions and in Scotland under and in terms of the Summary Jurisdiction (Scotland) Acts.

Unless a right of appeal to a Court of Quarter Sessions had been expressly provided, there would have been no such right of appeal, except against a sentence involving imprisonment without the option of a fine (*u*). There is apparently no right of appeal to quarter sessions against an order requiring the infringing copies to be destroyed or delivered up. In no case can an informant appeal to quarter sessions if the alleged offender is acquitted (*x*). If either party is dissatisfied with the determination either of the Court of first instance or the Court of Quarter Sessions as being erroneous in point of law he may apply in writing within three days to the justice or justices to state a case for the opinion of a Divisional Court, and the

(*s*) *Carlton Illustrators* v. *Coleman* (1910), 27 T. L. R. 65.
(*t*) Sect. 11.
(*u*) Summary Jurisdiction Act, 1879 (42 & 43 Vict. c. 49), s. 19; *R.* v. *JJ. of Devonshire* (1857), 21 J. P. 773; *R.* v. *Stock* (1838), 8 A. & E. 405, 412.
(*x*) *R.* v. *JJ. of London* (1890), 25 Q. B. D. 357.

justice or justices may be compelled to state a case (*y*). The finding of the Divisional Court is final and conclusive, and no appeal lies to the Court of Appeal. § 12.

In Scotland practically the only method of appealing against the order of the Court is by a case stated for the opinion of the Court of Justiciary (*z*).

13. The provisions of this Act with respect to summary remedies (*a*) shall extend only to the United Kingdom. Extent of provisions as to summary remedies.

By sect. 27 the legislature of any British possession to which the Act extends may make such modifications and additions relating to procedure and remedies as it thinks fit. It is open, therefore, to any British possession either to dispense with summary remedies altogether or to make special provision therefor by a separate Act or ordinance.

(*y*) Summary Jurisdiction Act, 1857 (20 & 21 Vict. c. 43).
(*z*) Summary Jurisdiction (Scotland) Act, 1908 (8 Edw. VII. c. 65), s. 60.
(*a*) Sect. 11.

Importation of Copies.

§ 14. Importation of copies.

14.—(1) Copies made out of the United Kingdom of any work in which copyright (*a*) subsists which if made in the United Kingdom would infringe (*b*) copyright, and as to which the owner (*c*) of the copyright gives notice in writing by himself or his agent to the Commissioners of Customs and Excise, that he is desirous that such copies should not be imported into the United Kingdom, shall not be so imported, and shall, subject to the provisions of this section, be deemed to be included in the table of prohibitions and restrictions contained in section forty-two of the Customs Consolidation Act, 1876, and that section shall apply accordingly.

39 & 40 Vict. c. 36.

(2) Before detaining any such copies or taking any further proceedings with a view to the forfeiture thereof under the law relating to the Customs, the Commissioners of Customs and Excise may require the regulations under this section, whether as to information, conditions, or other matters, to be complied with, and may satisfy themselves in accordance with those regulations that the copies are such as are prohibited by this section to be imported.

(*a*) Sect. 1 (2). (*b*) Sect. 2. (*c*) Sect. 5.

(3) The Commissioners of Customs and Excise may make regulations, either general or special, respecting the detention and forfeiture of copies the importation of which is probibited by this section, and the conditions, if any, to be fulfilled before such detention and forfeiture, and may, by such regulations, determine the information, notices, and security to be given, and the evidence requisite for any of the purposes of this section, and the mode of verification of such evidence.

(4) The regulations may apply to copies of all works the importation of copies of which is prohibited by this section, or different regulations may be made respecting different classes of such works.

(5) The regulations may provide for the informant reimbursing the Commissioners of Customs and Excise all expenses and damages incurred in respect of any detention made on his information, and of any proceedings consequent on such detention; and may provide for notices under any enactment repealed by this Act being treated as notices given under this section.

(6) The foregoing provisions of this section shall have effect as if they were part of the Customs Consolidation Act, 1876: Provided that, notwithstanding anything in that Act, the Isle of Man shall not be treated as part of the United Kingdom for the purposes of this section.

(7) This section shall, with the necessary modifications, apply to the importation into a

§ 14. British possession to which this Act extends of copies of works made out of that possession.

Supersedes Copyright Act, 1842, s. 17.

This section takes the place of sect. 17 of the Copyright Act, 1842, the paragraph in sect. 42 of the Customs Consolidation Act, 1876, relating to books, and sects. 44, 45 and 152 of the last-mentioned Act.

Alterations in law.

The substantial alterations which the section effects in the law relating to the importation of foreign reprints are—

(1) The principle of protecting the author against the importation of foreign reprints, whether made with or without his consent, is extended to all works protected by the Act. Under existing law it applies only to books.

(2) Protection is afforded against the importation of colonial copies as well as foreign copies.

(3) The Crown has no power as under existing law to remove the prohibition in the case of any British possession.

Meaning of "copy."

The meaning of "copies" is not defined in the Act. It is clear that not every work which would be an infringement within the meaning of sect. 2 is necessarily a "copy" within the meaning of this section. It is submitted that even where a work is an "infringing copy" within the meaning of sect. 7 and the definition section (*d*) which defines "infringing" in relation to a copy), it is not necessarily a "copy" within the meaning of this section. The words used in sect. 7 show that the copy of part of a work may be an infringing copy. Apparently, however, the "copy" referred to in this section means a copy of substantially the whole work. It is doubtful whether it is permissible for the purpose of this section to borrow from the definition clause the words which make "copy" include colourable imitation. On the whole, it is submitted that "copy" in this section does not include "colourable imitation," but only a reproduction *literatim et verbatim* in the same form. It is submitted, for instance, that a translation would not be

(*d*) Sect. 35 (1) ("Infringing").

a copy of the original within the meaning of this section, and *à fortiori* a record would not be a copy of the sheet music from which it has been taken.

"Which if made in the United Kingdom would infringe copyright."

If the owner of the copyright grants a licence restricted to some one part of the British dominions, copies made under that licence can be prohibited from importation into the United Kingdom. Such copies would have infringed copyright if they had been made in the United Kingdom. English authors, therefore, may grant licences for the production of cheap colonial editions, knowing that they cannot be imported into the United Kingdom so as to compete with the more expensive English edition. On the other hand, the section does not appear to give the protection which it ought to give in the case of a foreign or colonial author granting a licence to an English publisher. Copies which are made by such author or his agent are not copies which if made in the United Kingdom would infringe copyright, and accordingly the English publisher can only get complete security against the importation of cheap copies by taking an absolute assignment of the copyright for the United Kingdom.

Customs Consolidation Act, 1876, s. 42.

Sect. 42 of the Customs Consolidation Act, 1876, is as follows:—

> 42. The goods enumerated and described in the following table of prohibitions and restrictions inward are hereby prohibited to be imported or brought into the United Kingdom, save as thereby excepted, and if any goods so enumerated and described shall be imported or brought into the United Kingdom contrary to the prohibitions or restrictions contained therein such goods shall be forfeited, and may be destroyed or otherwise disposed of as the Commissioners of Customs may direct.

Copies unlawfully imported to be deemed infringing copies.

Where the requisite notice has been given under this section, all copies imported in contravention of the provisions thereof are infringing copies, and if not seized at the Customs, proceedings may be taken under sect. 7 for delivery up, or, if they have been sold, for damages for conversion.

Application of section

The Customs Consolidation Act, 1876, applies to all British possessions, except such possessions as have by

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to British possessions.

local act or ordinance made entire provision for the management and regulation of the Customs in such possession. The following is sect. 151 of the Act extending its operation to British possessions:—

Customs Consolidation Act, 1876, s. 151.

> 151. The Customs Acts shall extend to and be in full force and effect in the several British possessions abroad, except where otherwise expressly provided for by the said Acts, or limited by express reference to the United Kingdom or the Channel Islands, and except also as to any such possession as shall by local Act or ordinance have provided, or may hereafter with the sanction and approbation of Her Majesty and successors make entire provision for the management and regulation of the Customs of any such possession, or make in like manner express provisions in lieu or variation of any of the clauses of the said Act for the purposes of such possession.

Upon a literal interpretation of the above section, all possessions are excluded from its operation which before 1876 had made any provision for the regulation of their Customs, or which after 1876 have made entire provision. The better opinion appears to be that the Act should not be read too literally, and that the words "have made" should be substituted for "have provided." The section would then exclude from the operation of the Act only such possessions as whether before or after 1876 have made entire provision for the regulation of their Customs.

Existing law.—Provision is made for the seizure of books only. When notice is given to the Commissioners of Customs, all copies of a book printed outside the British dominions are prohibited from being imported for any purpose (*e*). They may be seized at the Customs, or if they pass the Customs an action may be brought for penalties, account of profits, and an injunction against the importer or against any person who sells or hires copies so unlawfully imported (*f*). The prohibition applies to copies printed abroad, whether with or without the consent of the proprietor, and without reference to the question whether they would or would not

(*e*) Customs Consolidation Act, 1876 (39 & 40 Vict. c. 36), ss. 42, 44, 45, 151, 152; Copyright Act, 1842 (5 & 6 Vict. s. 45), s. 17.

(*f*) *Pitt-Pitts* v. *George*, [1896] 2 Ch. 866; *Cooper* v. *Whittingham* (1880), 15 Ch. D. 501; *Black* v. *Imperial Book Co.* (1904), 8 Ont. L. R. 9.

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have infringed copyright if printed in the United Kingdom or other part of the British dominions. In the case of any British possession, the Crown has power by Order in Council to remove the prohibition against the importation of foreign reprints into such possession, provided proper steps have been taken to protect the proprietor of the copyright by way of collection of royalties or otherwise (*g*).

Under the Canada Copyright Act, Canadian reprints of books copyrighted in Canada may not be imported into the United Kingdom, but otherwise there is no prohibition against the importation of Colonial reprints (*h*).

(*g*) Colonial Copyright Act, 1847 (10 & 11 Vict. c. 95).
(*h*) Canada Copyright Act, 1875 (38 & 39 Vict. c. 53), s. 4.

Delivery of Books to Libraries.

Delivery of copies to British Museum and other libraries.

15.—(1) The publisher of every book published (*a*) in the United Kingdom shall, within one month after the publication, deliver, at his own expense, a copy of the book to the trustees of the British Museum, who shall give a written receipt for it.

(2) He shall also, if written demand is made before the expiration of twelve months after publication, deliver within one month after receipt of that written demand or, if the demand was made before publication, within one month after publication, to some depôt in London named in the demand a copy of the book for, or in accordance with the directions of, the authority having the control of each of the following libraries, namely: the Bodleian Library, Oxford, the University Library, Cambridge, the Library of the Faculty of Advocates at Edinburgh, and the Library of Trinity College, Dublin, and subject to the provisions of this section the National Library of Wales. In the case of an encyclopædia, newspaper, review, magazine, or work published in a series of numbers or parts, the written demand may include all numbers or

(*a*) Sect. 1 (3).

parts of the work which may be subsequently published. § 15 (2).

(3) The copy delivered to the trustees of the British Museum shall be a copy of the whole book with all maps and illustrations belonging thereto, finished and coloured in the same manner as the best copies of the book are published, and shall be bound, sewed, or stitched together, and on the best paper on which the book is printed.

(4) The copy delivered for the other authorities mentioned in this section shall be on the paper on which the largest number of copies of the book is printed for sale, and shall be in the like condition as the books prepared for sale.

(5) The books of which copies are to be delivered to the National Library of Wales shall not include books of such classes as may be specified in regulations to be made by the Board of Trade.

(6) If a publisher fails to comply with this section, he shall be liable on summary conviction to a fine not exceeding five pounds and the value of the book, and the fine shall be paid to the trustees or authority to whom the book ought to have been delivered.

(7) For the purposes of this section, the expression "book" includes every part or division of a book, pamphlet, sheet of letter-press, sheet of music, map, plan, chart or table separately published, but shall not include any second or subsequent edition of a book unless such edition contains additions or alterations either in the

§ 15 (7). letterpress or in the maps, prints, or other engravings belonging thereto.

Meaning of "book."

This section reproduces substantially the provisions of sects. 6 to 9 of the Copyright Act, 1842 (*b*). The obligation is still confined to books, and as a book is now protected under the general heading of literary, dramatic, musical, or artistic work, as the case may be, the old definition of "book" is borrowed from the Copyright Act, 1842, and used for the purposes of this section only. The following have been held to be books within the meaning of the definition:—

(1) A newspaper (*c*).
(2) A single sheet of music printed or in manuscript (*d*).
(3) A printed sheet containing a legal form (*e*).
(4) A volume of drawings without any letterpress (*f*).
(5) A Christmas card with verses on it (*g*).
(6) A sheet of drawings with no letterpress, except the names and prices of the articles illustrated (*h*).

The literary or artistic merit of the work contained in the sheet or volume has nothing to do with the question of whether or not it constitutes a "book" (*i*). Road books (*k*), directories (*l*), tradesmen's catalogues (*m*), sheets of advertisements (*n*), telegraph codes (*o*), com-

(*b*) 5 & 6 Vict. c. 45.
(*c*) *Walter* v. *Howe* (1881), 17 Ch. D. 708; *Walter* v. *Lane*, [1900] A. C. 539.
(*d*) *Clementi* v. *Golding* (1809), 2 Camp. 25; *Storace* v. *Longman* (1788), 2 Camp. 26, n.; *Hime* v. *Dale* (1803), 2 Camp. 27, n.; *White* v. *Geroch* (1819), 2 B. & Ald. 298.
(*e*) *Southern* v. *Bailes* (1894), 38 Sol. J. 681.
(*f*) *Bogue* v. *Houlston* (1852), 5 De G. & Sm. 267; *Maple* v. *Junior Army and Navy Stores* (1882), 21 Ch. D. 380; *Life Publishing Co.* v. *Rose Publishing Co.* (1906), 12 Ont. L. R. 386.
(*g*) *Hildesheimer and Faulkner* v. *Dunn* (1891), 64 L. T. (N. S.) 452.
(*h*) *Davis* v. *Benjamin*, [1906] 2 Ch. 491.
(*i*) *Walter* v. *Lane*, [1900] A. C. 539, 548.
(*k*) *Cary* v. *Longman* (1801), 1 East, 358; *Cary* v. *Kearsley* (1802), 4 Esp. 168.
(*l*) *Kelly* v. *Morris* (1866), L. R. 1 Eq. 697; *Morris* v. *Ashbee* (1868), L. R. 7 Eq. 34; *Morris* v. *Wright* (1870), L. R. 5 Ch. 279; *Longman* v. *Winchester* (1809), 16 Ves. 269; *Lamb* v. *Evans*, [1893] 1 Ch. 218.
(*m*) *Maple* v. *Junior Army and Navy Stores* (1882), 21 Ch. D. 369; *Collis* v. *Cater* (1898), 78 L. T. (N. S.) 613.
(*n*) *Lamb* v. *Evans*, [1893] 1 Ch. 218, 222.
(*o*) *Ager* v. *P. & O. Steam Navigation Co.* (1884), 24 Ch. D. 637.

mercial statistics (*p*), statistics connected with sport (*q*), time tables (*r*) and mathematical tables and calculations may each form the subject-matter of a book. Anything in fact may constitute a book, which either by pictures or symbols conveys information to the mind of the reader. On the other hand, things which are merely mechanical devices and which contain no other letterpress than is necessary to instruct the purchaser in the use of the device are not to be classed as books (*s*).

Meaning of "published."

By the International Copyright Act, 1886 (*t*), delivery of books to the libraries was not required in the case of books acquiring copyright by first publication either in a foreign country or in a British possession. No delivery was required unless a book was published in the United Kingdom. It was never decided, however, whether if a book, first published abroad or in a colony, was afterwards issued in the United Kingdom copies of it could be demanded as a book published in the United Kingdom. The better opinion appears to be that there was no right to demand copies of such books; but in practice the authorities of the British Museum, supported by various opinions of the law officers, did enforce delivery of all books issued here if they had on them the imprint of an English publisher. The authorities held that if a book was published here in the sense that copies were distributed by an English publisher, then copies could be demanded, even although that publication was not the first publication of the book. Under this section, it seems reasonably clear that the view taken by the authorities has now become statutory, and that if a book is published in the United Kingdom within the meaning of the definition in sect. 1 (3) of the Act, it is immaterial that it was first published elsewhere, unless it was so first published in a foreign country, in respect of which

(*p*) *Scott* v. *Stanford* (1867), L. R. 3 Eq. 718; *Maclean* v. *Moody* (1858), 20 D. 1154; *Trade Auxiliary* v. *Middlesborough* (1889), 40 Ch. D. 425; *Cate* v. *Devon* (1889), 40 Ch. D. 500.

(*q*) *Cox* v. *Land and Water* (1869), L. R. 9 Eq. 324; *Chilton* v. *Progress Printing Co.*, [1895] 2 Ch. 29; *Weatherby* v. *International Horse Agency*, [1910] 2 Ch. 297.

(*r*) *Leslie* v. *Young*, [1894] A. C. 335.

(*s*) *Hollinrake* v. *Truswell*, [1894] 3 Ch. 420; *Page* v. *Wisden* (1869), 20 L. T. (N. S.) 435; *Cable* v. *Marks* (1882), 47 L. T. (N. S.) 432; *Davis* v. *Comitti* (1885), 52 L. T. (N. S.) 539.

(*t*) 49 & 50 Vict. c. 33, ss. 4 (1), 8 (1) (a).

§ 15. an Order in Council has been made under sect. 29. In the case of books first published in such country, there is no obligation to deliver copies, even although subsequently published in the United Kingdom, except in so far as the Order in Council provides that this section shall apply to such books (*u*). It would not be within the power of an Order in Council to provide for the delivery of any foreign book not published in the United Kingdom.

(*u*) Sect. 29 (1) (iii).

Special Provisions as to certain Works.

§ 16.
Works of joint authors.

16.—(1) In the case of a work of joint authorship, copyright (*a*) shall subsist during the life of the author who first dies and for a term of fifty years after his death, or during the life of the author who dies last, whichever period is the longer, and references in this Act to the period after the expiration of any specified number of years from the death of the author (*b*) shall be construed as references to the period after the expiration of the like number of years from the death of the author who dies first or after the death of the author who dies last, whichever period may be the shorter, and in the provisions of this Act with respect to the grant of compulsory licences (*c*) a reference to the date of the death of the author who dies last shall be substituted for the reference to the date of the death of the author.

(2) Where, in the case of a work of joint authorship, some one or more of the joint authors do not satisfy the conditions conferring copyright laid down by this Act (*d*), the work shall be treated for the purposes of this Act as if the other

(*a*) Sect. 1 (2).
(*b*) Sects. 3, Proviso; 5 (2), Proviso.
(*c*) Sect. 4.
(*d*) Sect. 1 (1) (b).

§ 16 (2). author or authors had been the sole author or authors thereof:

Provided that the term of the copyright shall be the same as it would have been if all the authors had satisfied such conditions as aforesaid.

(3) For the purposes of this Act, "a work of joint authorship" means a work produced by the collaboration of two or more authors in which the contribution of one author is not distinct from the contribution of the other author or authors.

(4) Where a married woman and her husband are joint authors of a work the interest of such married woman therein shall be her separate property.

Meaning of joint authors.

There is no joint authorship within the meaning of this section if the contributions of two or more persons who have contributed to the making of a work are clearly distinguishable the one from the other. In such a case the work is a collective work, and there may be distinct copyrights (1) in the collection as a whole, and (2) in the separate contributions. On the other hand, there is no joint authorship when the work of the one has been so subordinate to that of the other that it may be deemed to have merged in it (*e*). True joint authorship is where there is a joint labour in the prosecution of a preconcerted joint design (*e*).

Term of copyright.

The term of copyright in the work of joint authors under existing law has usually been stated to be measured by the life of the survivor, but there are only *dicta* in support of this (*f*). If that was the law the principle is now changed; owing, perhaps, to the fear of fraudulent collusion between an elderly author and a very young person who might merely lend his name for the purpose of prolonging the copyright. The adoption, however, of the life of the shortest liver of the joint authors as the

(*e*) *Ante*, p. 11.
(*f*) *Nottage* v. *Jackson* (1883), 11 Q. B. D. 627, 637.

standard of measurement has led to a somewhat involved provision for dealing with the question of the periods during which copyright should be unassignable by the author, or during which the public should have the right to reproduce the work on a royalty basis (*g*). It is only reasonable that during the life of the surviving author the work should in no case fall into the public domain either wholly or in part, and therefore wherever a specified number of years from the death of the author who dies first elapses during the lifetime of the author who dies last, that period is prolonged until the death of the survivor. This in effect is the simple result of the clause, although attained by a somewhat unnecessary circuity of expression.

Nature of joint authors' interest in joint work.

There is nothing in the Act which defines the nature of the respective interests of each of two or more joint authors. Two questions arise—(1) whether they take as joint tenants or tenants in common; (2) whether they take equal shares, or how otherwise. It has been argued that joint authors take as joint tenants with a right of survivorship (*h*). Joint tenancy, however, is a relationship which invariably arises from a grant or assignment of property. Thus, co-patentees take as joint tenants under the grant contained in the letters patent (*i*), and in the absence of express direction the beneficiaries entitled to a settlement policy under the Married Women's Property Acts take as joint tenants (*k*). The property of joint authors in their joint work does not, however, arise from anything in the nature of a grant or assignment of property. The copyright vests under the statute by operation of law, and it is submitted that the principles relating to *commixtio* of goods applies, and that the authors take as tenants in common (*l*). In *Lauri* v. *Renad* (*m*). Kekewich, J., stated that joint authors were tenants in common; but he professed to rely solely on the authority of *Powell* v. *Head* (*n*), which does not in fact decide the point. In *Powell* v. *Head* the persons who

(*g*) Sects. 3, Proviso; 5 (2) Proviso.
(*h*) *Marzial* v. *Gibbons* (1874), L. R. 9 Ch. 518.
(*i*) Terrell on Patents, 5th ed. p. 192.
(*k*) *Davies' Policy Trust*, [1892] 1 Ch. 91.
(*l*) *Buckley* v. *Gross* (1863), 3 B. & S. 566.
(*m*) [1892] 3 Ch. 402, 412.
(*n*) (1879), 12 Ch. D. 686.

§ 16.

were held to be tenants in common were assignees each of an undivided moiety of the copyright. As regards the shares to which each of several joint authors may be entitled, it would seem that, as it must be quite impossible to arrive at any reasonably accurate conclusion as to the proportionate value of their contributions, it would be held that they take equal shares (*o*).

Proceedings in respect of infringement of joint work.

Where copyright is infringed proceedings for an injunction and delivery up may be taken by one tenant in common in his own name without joining the others (*p*). If, however, damages or profits are claimed, all the tenants in common should be before the Court either as plaintiffs or defendants, so that their proper shares may be determined and an inquiry as to damages taken once in respect of all claims (*q*).

Where one of the joint authors is a person who would not be entitled to copyright if he was sole author, as in the case of a foreign author of an unpublished work or a foreign author whose country has been proscribed under sect. 23, then the other joint author or authors, not being so disentitled, must for the purposes of this Act and any proceedings for infringement be deemed to be the sole author or authors. The author, however, who is disentitled from taking a legal copyright under the Act will have an equitable interest in the copyright to the extent of his share, and will be able to enforce such interest against the legal owners of the copyright. This, no doubt, is the reason why the duration of the copyright is to be the same as if all the authors had satisfied the conditions of the Act.

The case of a married woman writing a joint work with her husband is not covered by any of the provisions of the Married Women's Property Acts, and her interest becomes under the common law part of her husband's estate. Sub-sect. (4) was necessary in order to give a married woman equal rights with her husband in their joint work.

Posthumous works.

17.—(1) In the case of a literary (*r*) dramatic (*s*)

(*o*) *Jones* v. *Moore* (1841), 4 Y. & C. Ex. 351, 357.

(*p*) *Powell* v. *Head* (1879), 12 Ch. D. 686; *Sheehan* v. *Great Eastern* 1880), 16 Ch. D. 59.

(*q*) *Bergmann* v. *Macmillan* (1881), L. R. 17 Ch. D. 423.

(*r*) Sect. 35 (1) ("Literary work").

(*s*) Sect. 35 (1) ("Dramatic work").

§ 17 (1).

or musical work, or an engraving (*t*), in which copyright subsists (*u*) at the date of the death of the author (*x*) or, in the case of a work of joint authorship (*y*), at or immediately before the date of the death of the author who dies last, but which has not been published (*z*), nor, in the case of a dramatic or musical work, been performed (*a*) in public (*b*), nor, in the case of a lecture (*c*), been delivered (*d*) in public, before that date, copyright shall subsist till publication, or performance or delivery in public, whichever may first happen, and for a term of fifty years thereafter, and the proviso to section three of this Act shall, in the case of such a work, apply as if the author had died at the date of such publication or performance or delivery in public as aforesaid.

(2) The ownership of an author's manuscript after his death, where such ownership has been acquired under a testamentary disposition made by the author and the manuscript is of a work which has not been published nor performed in public nor delivered in public, shall be prima facie proof of the copyright being with the owner of the manuscript.

Unpublished drawings, paintings, &c., not

It will be observed that artistic works, other than engravings, do not come within the operation of this section. It follows that all copyright in drawings and paint-

(*t*) Sect. 35 (1) ("Engraving").
(*u*) Sect. 1.
(*x*) Sects. 19 (1), 21.
(*y*) Sect. 16.
(*z*) Sects. 1 (3), 35 (2).
(*a*) Sects. 35 (1) ("Performance"), 35 (2).
(*b*) *Ante*, p. 16.
(*c*) Sect. 35 (1) ("Lecture").
(*d*) Sect. 35 (1) ("Delivery").

§ 17.

protected under this section.

ings, &c., whether published or unpublished, ceases on the expiration of fifty years after the author's death, and that all copyright in photographs, whether published or unpublished, ceases fifty years after the making of the negative. As the common law right in unpublished works is abrogated, unpublished drawings, paintings and photographs, whatever their subject-matter may be, receive no protection after the expiration of the copyright, except that it may still be competent to restrain publication on the ground of breach of confidence or trust.

Meaning and effect of sub-sect. (2).

The existing law with regard to the ownership of the copyright in works posthumously published, is that the copyright shall belong to the proprietor of the author's manuscript (*e*). This was held, in the case of Charles Lamb's letters, to mean that the owner of the documents for the time being had an inchoate copyright, which would vest in him or his assigns upon publication (*f*). Under the new Act the copyright, whether in letters or other "authors' manuscripts," will remain the property of the author, and pass from him to his personal representatives, unless there has been an assignment of the copyright in writing. It will be observed that sub-sect. (2) only applies when the manuscript is the property of the author at the date of his death. Letters, therefore, will not fall within its operation, unless the writer has kept copies. Where the author is the owner of a manuscript at the date of his death, and it passes under his testamentary disposition either to a specific or residuary legatee, there is a presumption that such legatee is also the owner of the copyright. It would have been much more satisfactory if the Act had provided that any bequest of the manuscript should be deemed to pass the ownership of the copyright: and the question is whether that, in effect, is the meaning of the sub-section, or whether, on the other hand, it may be said, where there is a specific bequest of a manuscript to A., and B. is made residuary legatee, that B. in fact takes the copyright, and that A.'s *primâ facie* proof of title by showing the bequest to him can be rebutted by B. proving that he is residuary legatee. If this latter view is right, the sub-section is reduced to an absurdity: and it is submitted that, on the whole, it would be permissible to strain the literal meaning of the

(*e*) Copyright Act, 1842, 5 & 6 Vict. c. 45, s. 3.
(*f*) *Macmillan* v. *Dent*, [1907] 1 Ch. 107.

words, and to construe it as if it had been enacted that a bequest of the author's manuscript should be deemed to pass any copyright therein then subsisting and the property of the author. § 17.

18. Without prejudice to any rights or privileges of the Crown, where any work has, whether before or after the commencement of this Act (*g*), been prepared or published (*h*) by or under the direction or control of his Majesty or any Government department, the copyright (*i*) in the work shall, subject to any agreement with the author, belong to his Majesty, and in such case shall continue for a period of fifty years from the date of the first publication (*h*) of the work. Provisions as to Government publications.

When the Crown ceased to have the complete control which it originally exercised over the printing press, it still claimed to retain as its prerogative the exclusive right of printing such works as it considered its own peculiar property (*k*). These included the authorised translation of the Bible, the Common Prayer Book, Acts of Parliament (*l*), and proclamations (*m*). The Stationers' Company, the King's printers, the universities, and from time to time various individuals received grants of authority to print such works. Royal prerogative.

As regards the Bible and Prayer Book, the Universities of Oxford and Cambridge and the King's printer hold a grant from the Crown, and their legal right to print and to prevent others from printing these books is fully established (*n*). The Crown, however, and its Bible and Prayer Book.

(*g*) Sect. 37.
(*h*) Sects. 1 (3), 35 (2).
(*i*) Sect. 1.
(*k*) See *Millar* v. *Taylor* (1769), 4 Burr. 2329.
(*l*) *Baskett* v. *University of Cambridge* (1758), 2 Burr. 661; *Baskett* v. *Cunningham* (1762), Black. 370.
(*m*) *Grierson* v. *Jackson* (1794), Ridg. Ir. T. R. 304; *Nicol* v. *Stockdale* (1785), 3 Swanst. 687.
(*n*) *Universities* v. *Richardson* (1802), 1 Ves. 689; *Manners* v. *Blair* (1828), 3 Bligh (N. S.), 391; *Manners* v. *King's Printer* (1826), 2 State Trials (N. S.), 215; *Grierson* v. *Jackson* (1794), Ridg. Ir. T. R. 304; *Eyre* v. *Carnan* (1781), 6 Bac. Abr. 509; *The Red Letter New Testament, In re* (1900), 17 T. L. R. 1.

§ 18. licensees have never objected to the printing of the Bible, or portions of the Bible, with notes, and probably no objection could now be taken to this being done by any person. The notes, however, must be substantial, and not merely illusory (*o*).

Government publications. As regards Government publications, such as ordnance maps, reports, and other papers, the title of the Crown has hitherto not been very clear. It would seem that, in such works, the copyright is *primâ facie* in the author, and that the Crown could only show a title by assignment from the author. Certain works might, as collective works, come under the provisions of sect. 18 of the Copyright Act, 1842, and others might vest in the Crown on the ground that the work done by a paid servant in the course of his employment vests *ab initio* in the employer. In many cases, however, the difficulties of proof, either of title or duration of copyright, were considerable, and the object of this section is to get over such difficulties by vesting all copyrights in the Crown for a period of fifty years from publication. The introductory words of the section will operate to preserve the Royal prerogative in the Bible and Common Prayer Book.

Treasury minute. The Treasury does not in fact enforce the full rights of the Crown in respect of all Government publications, and on August 31st, 1887, they published in the London Gazette a minute specifying those classes of publications in respect of which the rights of the Crown would not be enforced, and those classes in respect of which they would.

Government publications which are free. The following works are declared to be free, and any person may print and publish them with or without notes:—

1. Reports of Select Committees of the two Houses of Parliament or of Royal Commissions.
2. Papers required by statute to be laid before Parliament, *e.g.*, Orders in Council, Rules made by Government Departments, Accounts, Reports of Government Inspectors.
3. Papers laid before Parliament by Command, *e.g.*, Treaties, Diplomatic Correspondence, Reports from Consuls and Secretaries of Legations,

(*o*) *Baskett* v. *Cunningham* 1762), Black. 370.

Reports of Inquiries into Explosions or Accidents and other Special Reports made to Government Departments.

4. Acts of Parliament.

5. Official books, *e.g.*, King's Regulations for the Army or Navy.

Government publications in respect of which copyright is asserted.

As regards the following works, the Treasury declares its intention of enforcing copyright so that their cost of production may be met by the proceeds of the sale of copies to the public, and the taxpayer be thus relieved.

1. Literary or quasi-literary work, *e.g.*, the Reports of the *Challenger* Expedition, the Rolls Publications, the State Trials, the "Board of Trade Journal."

2. Charts or Ordnance Maps.

Provisions as to mechanical instruments.

19.—(1) Copyright (*p*) shall subsist in records, perforated rolls, and other contrivances by means of which sounds may be mechanically reproduced, in like manner as if such contrivances were musical works, but the term of copyright shall be fifty years from the making of the original plate (*q*) from which the contrivance was directly or indirectly derived, and the person who was the owner of such original plate at the time when such plate was made shall be deemed to be the author of the work, and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act (*r*) to reside within the parts of his Majesty's dominions to which this Act extends (*s*) if it has established a place of business within such parts.

(*p*) Sect. 1 (2).
(*q*) Sect. 35 (1) ("Plate").
(*r*) Sects. 1 (1) (b), 23, 26 (3), 27.
(*s*) Sects. 25 (1), 26 (1), 28, 35 (1) ("Self-Governing dominion").

§ 19 (2). (2) It shall not be deemed to be an infringement (*t*) of copyright in any musical work for any person to make within the parts of his Majesty's dominions to which this Act extends records, perforated rolls, or other contrivances by means of which the work may be mechanically performed, if such person proves—

(a) that such contrivances have previously been made by, or with the consent or acquiescence of, the owner (*u*) of the copyright in the work; and

(b) that he has given the prescribed notice of his intention to make the contrivances, and has paid in the prescribed manner to, or for the benefit of, the owner of the copyright in the work royalties in respect of all such contrivances sold by him, calculated at the rate herein-after mentioned:

Provided that—

(i) nothing in this provision shall authorise any alterations in, or omissions from, the work reproduced, unless contrivances reproducing the work subject to similar alterations and omissions have been previously made by, or with the consent or acquiescence of, the owner of the copyright, or unless such alterations or omissions are reasonably necessary for the adaptation of the work to the contrivances in question; and

(*t*) Sect. 2. (*u*) Sect. 5.

(ii) for the purposes of this provision, a musical work shall be deemed to include any words so closely associated therewith as to form part of the same work, but shall not be deemed to include a contrivance by means of which sounds may be mechanically reproduced. § 19 (2) (ii).

(3) The rate at which such royalties as aforesaid are to be calculated shall—

(a) in the case of contrivances sold within two years after the commencement of this Act (*x*) by the person making the same, be two and one-half per cent.; and

(b) in the case of contrivances sold as aforesaid after the expiration of that period, five per cent.

on the ordinary retail selling price (*y*) of the contrivance calculated in the prescribed manner, so however that the royalty payable in respect of a contrivance shall, in no case, be less than a half-penny for each separate musical work in which copyright subsists reproduced thereon, and where the royalty calculated as aforesaid includes a fraction of a farthing, such fraction shall be reckoned as a farthing:

Provided that, if, at any time after the expiration of seven years from the commencement of this Act, it appears to the Board of Trade that such rate as aforesaid is no longer equitable, the Board of Trade may, after holding a public inquiry, make an order either decreasing or increasing

(*x*) Sect. 37.

(*y*) Cf. sect. 3.

§ 19 (3). that rate to such extent as under the circumstances may seem just, but any order so made shall be provisional only and shall not have any effect unless and until confirmed by Parliament; but, where an order revising the rate has been so made and confirmed, no further revision shall be made before the expiration of fourteen years from the date of the last revision.

(4) If any such contrivance is made reproducing two or more different works in which copyright subsists and the owners of the copyright therein are different persons, the sums payable by way of royalties under this section shall be apportioned amongst the several owners of the copyright in such proportions as, failing agreement, may be determined by arbitration.

(5) When any such contrivances by means of which a musical work may be mechanically performed have been made, then, for the purposes of this section, the owner of the copyright in the work shall, in relation to any person who makes the prescribed inquiries, be deemed to have given his consent to the making of such contrivances if he fails to reply to such inquiries within the prescribed time.

(6) For the purposes of this section, the Board of Trade may make regulations prescribing anything which under this section is to be prescribed, and prescribing the mode in which notices are to be given and the particulars to be given in such notices, and the mode, time, and frequency of the payment of royalties, and any such regu-

lations may, if the Board think fit, include regulations requiring payment in advance or otherwise securing the payment of royalties. § 19 (6).

(7) In the case of musical works published before the commencement of this Act, the foregoing provisions shall have effect, subject to the following modifications and additions:—

(a) The conditions as to the previous making by, or with the consent or acquiescence of, the owner of the copyright in the work, and the restrictions as to alterations in, or omissions from the work, shall not apply:

(b) The rate of two and one-half per cent. shall be substituted for the rate of five per cent. as the rate at which royalties are to be calculated, but no royalties shall be payable in respect of contrivances sold before the first day of July, nineteen hundred and thirteen, if contrivances reproducing the same work had been lawfully made, or placed on sale, within the parts of His Majesty's dominions to which this Act extends before the first day of July, nineteen hundred and ten:

(c) Notwithstanding any assignment made before the passing of this Act of the copyright in a musical work, any rights conferred by this Act (*z*) in respect of

(*z*) Sect. 1 (2) (a).

§ 19 (7). the making, or authorising the making, of contrivances by means of which the work may be mechanically performed shall belong to the author or his legal personal representatives and not to the assignee, and the royalties aforesaid shall be payable to, and for the benefit of, the author of the work or his legal personal representatives:

(d) The saving contained in this Act (*a*) of the rights and interests arising from or in connexion with action taken before the commencement of this Act shall not be construed as authorising any person who has made contrivances by means of which the work may be mechanically performed to sell any such contrivances, whether made before or after the passing of this Act, except on the terms and subject to the conditions laid down in this section:

(e) Where the work is a work on which copyright is conferred by an Order in Council relating to a foreign country (*b*), the copyright so conferred shall not, except to such extent as may be provided by the Order, include any rights with respect to the making of records, perforated rolls, or other contrivances by

(*a*) Sect. 24 (1) (b).
(*b*) Sect. 29.

means of which the work may be mechanically performed.

(8) Notwithstanding anything in this Act (*c*), where a record, perforated roll, or other contrivance by means of which sounds may be mechanically reproduced has been made before the commencement of this Act, copyright shall, as from the commencement of this Act, subsist therein in like manner and for the like term as if this Act had been in force at the date of the making of the original plate from which the contrivance was directly or indirectly derived:

Provided that—

(i) the person who, at the commencement of this Act, is the owner of such original plate shall be the first owner of such copyright; and

(ii) nothing in this provision shall be construed as conferring copyright in any such contrivance if the making thereof would have infringed copyright in some other such contrivance, if this provision had been in force at the time of the making of the first-mentioned contrivance.

Existing law.

Under existing law, the making of records, perforated rolls and other such contrivances is not an infringement of copyright in the sheet music (*d*). Neither is there any copyright in a record, and thus a record which has cost a great deal to produce owing to the large fee paid to an operatic singer, may be reproduced by any other manufacturers of records without permission.

(*c*) Sect. 24.

(*d*) *Ante*, pp. 14, 22.

§ 19.

Right to make records from sheet music.

With regard to the right to make records or rolls from sheet music, this will become part of the copyright (*e*), and the right will subsist not only in respect of new works published after the commencement of the Act, but also in respect of old works published before the commencement of the Act (*f*). The exclusive right, however, conferred by sects. 1 (2) and 24 is made subject to the limitations laid down in this section. These limitations may be briefly summarised:—

Old works—

May be reproduced with or without alterations or omissions, and irrespective of their previous adaptation to mechanical instruments;

If the work has been lawfully reproduced or sold in the form of a record before July 1, 1910,

Free of royalty until July 1, 1913;

If the work has not been so lawfully reproduced or sold, and in any case in respect of sales after July 1, 1913,

On payment of $2\frac{1}{2}$ per cent. royalty on the ordinary retail selling price.

New works—

May be reproduced if the owner of the copyright has already permitted the making of similar contrivances;

But no alterations or omissions may be made except—

(1) Where similar alterations or omissions have been permitted by owner;

(2) Where reasonably necessary for the adaptation of the work;

On payment of royalty on ordinary retail selling price—

$2\frac{1}{2}$ per cent. on sales up to July 1, 1914;

5 per cent. on subsequent sales.

Copyright in records: retrospective operation of section.

With regard to the right to copy records, these will be protected as musical works, and no one will be entitled to make reproductions either in the form of records or otherwise. This provision is made retrospective in the sense that all reproductions from records, although lawfully made before the passing of the Act, will become

(*e*) Sect. 1 (2) (c). (*f*) Sect. 24.

infringing copies, and the owners of the original records will be able to take proceedings under sect. 7 for delivery up of all such reproductions. § 19.

20. Notwithstanding anything in this Act, it shall not be an infringement of copyright (*g*) in an address (*h*) of a political nature delivered (*i*) at a public meeting to publish (*k*) a report thereof in a newspaper. Provision as to political speeches.

The right of newspapers to criticize, summarise, or report verbatim is considered in the commentary to sect. 2 (1) (i) and (v).

21. The term (*l*) for which copyright (*m*) shall subsist in photographs (*n*) shall be fifty years from the making of the original negative from which the photograph was directly or indirectly derived, and the person who was owner of such negative at the time when such negative was made shall be deemed to be the author of the work (*o*), and, where such owner is a body corporate, the body corporate shall be deemed for the purposes of this Act (*p*) to reside within the parts of His Majesty's dominions to which this Act extends (*q*) if it has established a place of business within such parts. Provisions as to photographs.

At present, under the Fine Arts Act, 1862, photographs are protected for the life of the author and seven years. Nature and extent of protection.

(*g*) Sect. 1.
(*h*) Sect. 35 (1) ("Lecture").
(*i*) Sect. 35 (1) ("Delivery").
(*k*) Sect. 1 (3).
(*l*) Sect. 3.
(*m*) Sect. 1 (2).
(*n*) Sect. 35 (1) ("Photograph").
(*o*) Sect. 5 (1).
(*p*) Sects. 1 (1) (b), 23, 26 (3), 27.
(*q*) Sects. 25 (1), 26 (1), 28, 35 (1) ("Self-governing dominions").

§ 21. After the new Act comes into operation the period of fifty years from making will be substituted and will apply both to old and new works (*r*), and the publication or non-publication of the photograph will not affect the term of copyright. After the fifty years has expired there will be no proprietary right of any kind in the photograph, even although unpublished (*s*). In the case of an unpublished photograph the protection depends on whether the author has the necessary qualification of nationality or residence (*t*). In the case of a published photograph the protection or continuation of protection depends on whether it has been first published within the territorial limits previously defined (*u*).

Author of photograph.

The Act sets up a fictitious author, and thereby gets rid of the difficulty of ascertaining in the case of photographs who it was who actually exposed the plate, or, as the author was defined in one case, who was the effective cause of the picture which was produced (*x*).

Ownership of copyright in.

The owner of the negative when the photograph is taken is the first owner of the copyright, except where "the negative was ordered by some other person and was made for valuable consideration in pursuance of that order" (*y*). This probably leaves the law very much as it is at present with regard to the copyright and ownership of the negative in the case of photographs taken by a professional photographer. In the ordinary transaction between a professional photographer and his customer the presumption will be as before, that the copyright vests in the customer (*z*); but that, by the custom of the trade, the property in the negative remains with the photographer (*a*). The presumption that copyright vests in a person who sits to a photographer may be rebutted where the circumstances show that the photographer was not commissioned to take the photograph, but took it on his own behalf,

(*r*) Sect. 24.
(*s*) Sect. 31.
(*t*) *Ante*, pp. 2, 7.
(*u*) *Ante*, pp. 2, 5.
(*x*) *Nottage* v. *Jackson* (1883), 11 Q. B. D. 627.
(*y*) Sect. 5 (1).
(*z*) *Bowcas* v. *Cooke*, [1903] 2 K. B. 227; *Wooderson* v. *Tuck* (1887), 4 T. L. R. 57.
(*a*) *Rotary Photographic Co.* v. *Tuber Bas-Relief* (1903), British Journal of Photography, Vol. 50, p. 250; *McCosh* v. *Crow* (1903), 40 S. L. R. 514; *Gibbon* v. *Pease*, [1905] 1 K. B. 810.

and that the sitter sat at his request either for a money consideration paid to the sitter, or in consideration for a copy or copies of the photograph, or for no consideration at all (*b*). Where no money consideration passes it is not always easy to determine whether the photographer took the photograph for his own purposes or whether he was commissioned for valuable consideration. The opportunity which the photographer gets of taking the photograph and his chance of selling copies to the customer if the photograph turns out to be satisfactory may be a valuable consideration, and if the photograph was made in pursuance of an order the copyright will vest in the person who gave the order, even although he did not pay and was not bound to pay for the photograph or to order any copies unless he pleased (*c*).

Photographer and customer: breach of contract.

As no registration is now necessary as a condition precedent to action, the case of *Pollard* v. *Photographic Company* (*d*) has lost much of its importance. In that case it was held that where a photographer was employed by a customer in the ordinary way, then even although through want of proper registration the customer could not sue on copyright, yet, as there was an implied term in the contract between the parties that the photographer would only use the negative for the purpose of supplying his customer with copies, the customer could restrain the photographer from making copies for his own use or selling copies or exhibiting them in public.

Arrangement between press photographer and illustrated papers.

Difficult questions sometimes arise out of the transactions between press photographers and the proprietors of illustrated papers. It is common for the press photographer to take large numbers of photographs of sporting and other events and places of current interest, and to submit prints to the numerous illustrated papers. The editor of the paper selects such photographs as may be suitable for his current issue, and may put some of them

(*b*) *Melville* v. *Mirror of Life*, [1895] 2 Ch. 531; *Ellis* v. *Marshall* (1895), 11 T. L. R. 522; *Ellis* v. *Ogden* (1894), 11 T. L. R. 50.

(*c*) *Stackemann* v. *Puton*, [1906] 1 Ch. 774. In the case cited the question was whether under the Fine Arts Copyright Act, 1862, there was "good or valuable consideration." Farwell, J., noted this distinction between "good" and "valuable," and held that there might be "good" consideration although it was not "valuable" consideration. Under the new Act the consideration must be valuable, but it is submitted that on the facts stated there was a valuable consideration.

(*d*) (1888), 4 Ch. D. 345.

§ 21. on one side for possible use in the future. When any photograph is published in the paper, a fee is paid upon an agreed scale. It has been held that, in the absence of express terms, the proper inference is that, when a print is sent, the sending of it constitutes an offer to permit that photograph to be reproduced for the agreed fee. The offer is one that can be withdrawn at any time before acceptance, and therefore the photographer may, at any time before a photograph has actually been inserted in the make up for a particular issue, withdraw his permission, and prohibit all further reproduction of his photographs. The fact that the proprietor of the paper has made a block does not entitle him to say that he has accepted the photographer's offer, and may therefore reproduce the photograph at any future time on payment of the agreed fee. Sometimes a lower scale of charges is agreed for a second or subsequent reproduction of the same photograph, but even that does not give the proprietor of the paper who has reproduced the photograph once, and has the block in his possession, an irrevocable licence to reproduce it a second time (*e*). It is clear that if a photograph is submitted for reproduction in one paper, the proprietor of the paper cannot reproduce it in another paper without the photographer's express consent (*f*).

Provisions as to designs registrable under 7 Edw. 7. c. 29.

22.—(1) This Act shall not apply to designs capable of being registered under the Patents and Designs Act, 1907, except designs which, though capable of being so registered, are not used or intended to be used as models or patterns to be multiplied by any industrial process.

(2) General rules under section eighty-six of the Patents and Designs Act, 1907, may be made for determining the conditions under which a design shall be deemed to be used for such purposes as aforesaid.

(*e*) *Bowden Bros.* v. *Amalgamated Pictorials, Ltd.*, [1911] 1 Ch. 386.
(*f*) *Nicholls* v. *Parker* (1901), 17 T. L. R. 482.

§ 22.

Alteration of the law.

This clause will effect a substantial alteration in the law in so far as designs in the nature of drawings are concerned. At present, in addition to the exclusive right under the Patents and Designs Act, 1907, of applying the design to articles of manufacture, the author has, for the full term of life and seven years under the Fine Arts Copyright Act, 1862, the right to prevent any one from reproducing the design in pictorial form in the flat. As the effect of the general provisions of the Act is to give the author of a drawing the exclusive right to reproduce the artistic design thereof in any material form whatsoever, it is clear that if some limitation was not introduced, the authors of all industrial designs would, in effect, acquire an absolute monopoly in their designs for life and fifty years. The object of the clause is to avoid this result, and to leave designs (used or intended to be used as patterns to be multiplied by any industrial process) under the short term of protection now given by the Patents and Designs Act, 1907.

Definition of "design."

"Design" is defined by sect. 93 of the Patents and Designs Act, 1907, as meaning "any design (not being a design for a sculpture or other thing within the protection of the Sculpture Copyright Act, 1814) applicable to any article, whether the design is applicable for the pattern, or for the shape or configuration, or for the ornament thereof, or for any two or more of such purposes, and by whatever means it is applicable, whether by printing, painting, embroidering, weaving, sewing, modelling, casting, embossing, engraving, staining, or any other means whatever, manual, mechanical, or chemical, separate or combined" (*f*).

Christmas cards and advertising posters.

The application of this section to Christmas cards and advertising posters raises questions of some difficulty. In either case there is usually a combination of words and pictures blended together to form a picturesque whole. The real question appears to be whether the design so produced is "applicable to any article for the pattern, or for the shape or configuration, or for the ornament thereof." In most cases a design for a Christmas card may be deemed to be so applicable (*g*): but in the case

(*f*) See *Saunders* v. *Wiel*, [1893] 1 Q. B. 470.
(*g*) *Millar and Lang* v. *Polak*, [1908] 1 Ch. 433.

§ 22

of a poster the design itself is the article, and, although reproduced in a large size suitable for posting on hoardings, there is no application of the design to an article, and the same may be said of some Christmas cards. It is submitted, therefore, that whereas Christmas cards ought as a rule to be registered as designs, posters need not be so registered, and will enjoy full protection as artistic works.

Protection under the Patents and Designs Act, 1907, is conditional upon registration. The Comptroller may, on the application made in the prescribed form and manner of any person claiming to be the proprietor of any new or original design not previously published in the United Kingdom, register the design (*h*). The disclosure of a design confidentially to a prospective purchaser of goods to which the design is to be applied, is not to be deemed a publication (*i*).

On registration, copyright subsists in the first instance for five years, but that period may be extended by successive applications for renewal to a total period of fifteen years (*k*).

Articles to which a copyright design is applied must, before delivery on sale, be marked with the prescribed mark denoting that the design is registered (*l*).

Works of foreign authors first published in parts of His Majesty's dominions to which Act extends.

23. If it appears to His Majesty that a foreign country does not give, or has not undertaken to give, adequate protection to the works of British authors, it shall be lawful for His Majesty by Order in Council to direct that such of the provisions of this Act as confer copyright on works first published within the parts of His Majesty's dominions to which this Act extends (*m*), shall not apply to works published after the date specified in the Order, the authors whereof are subjects or

(*h*) 7 Edw. VII. c. 29, s. 49.
(*i*) 7 Edw. VII. c. 29, s. 55; *Blank* v. *Footman* (1888), 39 Ch. D. 678.
(*k*) 7 Edw. VII. c. 29, s. 53.
(*l*) Sect. 54.
(*m*) Sect. 1 (1).

citizens of such foreign country, and are not resident in His Majesty's dominions, and thereupon those provisions shall not apply to such works. § 23.

Object of the clause.

At present, any foreign author may acquire copyright in a book by first publication within the British dominions, and if an artistic work is first published as part of a book, copyright in the work of any foreign artist can be obtained in the same way. This Act *primâ facie* protects the literary or artistic work of any foreign author or artist if such work is first published within the prescribed territorial limits. The object of this clause is to make the right of the foreign author to acquire copyright by first publication, to a certain extent, dependent upon his country's treatment of British authors. If British authors are entirely excluded from copyright in a foreign country, or are admitted only on very onerous conditions, this country may retaliate by excluding the citizens of such foreign country from all protection here.

Contrary to the Berlin Convention.

It will be observed that, if this clause is put into operation, it will constitute a violation of Article 6 of the Berlin Convention, and Article 3 of the Berne Convention, and Article I., 2. of the Act of Paris.

Follows International Copyright Act, 1886, s. 2 (2).

A precedent for the principle of the clause may be found in sect. 2 (2) of the International Copyright Act, 1886, under which power was reserved to exclude non-union authors from obtaining protection here by first publication in a foreign union country. Although an Order in Council under that section might substitute the union publisher for the non-union author as the person entitled to protection, it might, on the other hand, entirely exclude the work from protection. As the power, however, under this section was never exercised, the international aspect of the matter was never discussed, and it is very probable that sect. 23 of the Act will similarly escape observation and condemnation.

Existing works.

24.—(1) Where any person is immediately before the commencement of this Act entitled to any such right in any work as is specified

§ 24 (1). in the first column of the First Schedule to this Act, or to any interest in such a right, he shall, as from that date, be entitled to the substituted right set forth in the second column of that schedule, or to the same interest in such a substituted right, and to no other right or interest, and such substituted right shall subsist for the term for which it would have subsisted if this Act had been in force at the date when the work was made and the work had been one entitled to copyright thereunder:

Provided that—

(a) if the author of any work in which any such right as is specified in the first column of the First Schedule to this Act subsists at the commencement of this Act has, before that date, assigned the right or granted any interest therein for the whole term of the right, then at the date when, but for the passing of this Act, the right would have expired the substituted right conferred by this section shall, in the absence of express agreement, pass to the author of the work, and any interest therein created before the commencement of this Act and then subsisting shall determine; but the person who immediately before the date at which the right would so have expired was the owner of the

right or interest shall be entitled at his option either— § 24 (1).

(i) on giving such notice as hereinafter mentioned, to an assignment of the right or the grant of a similar interest therein for the remainder of the term of the right for such consideration as, failing agreement, may be determined by arbitration; or

(ii) without any such assignment or grant, to continue to reproduce or perform the work in like manner as theretofore subject to the payment, if demanded by the author within three years after the date at which the right would have so expired, of such royalties to the author as, failing agreement, may be determined by arbitration, or, where the work is incorporated in a collective work and the owner of the right or interest is the proprietor of that collective work, without any such payment;

The notice above referred to must be given not more than one year nor less than six months before the date at which the right would have so expired, and must be sent by registered post to the author, or, if he cannot with reasonable diligence be found, advertised in the London Gazette and in two London newspapers:

§ 24 (1).

(b) where any person has, before the twenty-sixth day of July nineteen hundred and ten, taken any action whereby he has incurred any expenditure or liability in connexion with the reproduction or performance of any work in a manner which at the time was lawful, or for the purpose of or with a view to the reproduction or performance of a work at a time when such reproduction or performance would, but for the passing of this Act, have been lawful, nothing in this section shall diminish or prejudice any rights or interest arising from or in connexion with such action which are subsisting and valuable at the said date, unless the person who by virtue of this section becomes entitled to restrain such reproduction or performance agrees to pay such compensation as, failing agreement, may be determined by arbitration.

(2) For the purposes of this section, the expression "author" includes the legal personal representatives of a deceased author.

(3) Subject to the provisions of section nineteen sub-sections (7) and (8) and of section thirty-three of this Act, copyright shall not subsist in any work made before the commencement of this Act, otherwise than under, and in accordance with, the provisions of this section.

§ 24.

What existing works come under protection and who is entitled to copyright.

The object of this section, combined with the First Schedule, is to define the application of the Act to works already in existence when the Act shall come into operation. The principal features of these provisions are—

(1) Unpublished letters, manuscripts and printed matter, engravings and sculpture will be protected in the same manner as if they had been created after the date of the Act.

(2) Unpublished paintings, drawings and photographs will get no protection under the Act if the period of the author's life and seven years has expired at the date of the Act: If such period has not expired they will be protected in the same manner as if they had been created after the date of the Act.

(3) A published work which has acquired no statutory copyright or performing right under the present law will acquire no protection under the Act. The only exception to this is the case of records, which receive special treatment under sect. 19 (8).

(4) Where statutory copyright or performing right in a work has been enjoyed under the present law, but has expired when the Act comes into operation, such work will obtain no right under the Act corresponding to that right which has expired.

(5) Where statutory copyright or performing right in a work is still subsisting when the Act comes into operation, such work will acquire the corresponding right or rights under this Act, that is to say—

(i) An extended term;

(ii) Enlarged protection, *e.g.*, the exclusive right of recitation, dramatization, making records, &c.

(6) Until the expiration of the original term of copyright, the enlarged protection given by the Act enures to the owner of the right, whether author or assignee; except that in the case of musical works the right of making records enures to the author under all circumstances.

(7) After the expiration of the original term of copyright, the extended term enures for the benefit

§ 24.

of the author and his representatives, subject to the following limitations where he has assigned his original copyright:—

(i) The assignee has the right of compulsory purchase of the extended term;

(ii) The assignee may continue to reproduce as theretofore if he pays royalties, or without paying royalties, in the case of a work which has been incorporated in a collective work.

(8) Inasmuch as published works in which copyright subsists when the Act comes into operation will acquire an enlarged protection, proviso (b), it is necessary in the interests of persons who have invested capital or made contracts on the footing that the making of derivative works, such as the dramatization of a novel, without the consent of the owner of the copyright, was at the time perfectly legal. The case of records receives special treatment under sect. 19.

(9) As regards questions of title in the case of works in existence before the Act comes into force, all devolutions of title before that date must be determined in accordance with existing law, all devolutions of title after that date must be determined in accordance with the provisions of the Act.

Application of section to contributions to collective works under 5 & 6 Vict. c. 45, s. 18.

In the case of collective works, published before the Act comes into operation, if the proprietor has acquired copyright in a contribution under sect. 18, he, under existing law, enjoys the same rights as if he were the actual author thereof, except only that, in the case of periodical works, the right of publishing in separate form reverts to the author twenty-eight years after publication. After the lapse of twenty-eight years, or earlier separate publication with the proprietor's consent, there is a dual copyright (*n*). It would seem that the result of this section is that, in the case of an encyclopædia or other similar work which is collective, but not periodical, then the whole of the copyright under the new Act for the full term thereof goes to the proprietor, and that the author takes

(*n*) *Vide ante*, p. 57.

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no benefit from the extended term (*o*). On the other hand, if the work is a periodical, the proprietor's copyright is expressly stated in the schedule to be subject to any right of publishing the contribution in a separate form to which the author is entitled at the commencement of the Act, or would if the Act had not been passed have become entitled under sect. 18 of the Copyright Act, 1842. The result of this seems to be that if the contributor has lawfully published the work in separate form, or twenty-eight years from first publication has expired, before the new Act comes into operation, then the contributor will have a concurrent copyright in the contribution for his life and fifty years. On the other hand, if the contributor has not, either by the lapse of twenty-eight years or separate publication, a subsisting copyright in his contribution at the date when the Act comes into operation, then it would seem that he derives no concurrent copyright which he can enforce against third persons, but has merely a statutory licence from the proprietor to publish separately at the end of the twenty-eight years.

(*o*) In the case of contributions where copyright vests *ab initio* in the proprietor under sect. 18 there is no assignment of the right, or grant of any interest therein, so as to bring the case within proviso (a). The effect of the section is to vest the copyright in the proprietor as if he were the author.

Application to British Possessions.

§ 25 (1). Application of Act to British dominions.

25.—(1) This Act, except such of the provisions thereof as are expressly restricted to the United Kingdom, shall extend throughout His Majesty's dominions: Provided that it shall not extend to a self-governing dominion, unless declared by the Legislature of that dominion to be in force therein either without any modifications or additions, or with such modifications and additions relating exclusively to procedure and remedies, or necessary to adapt this Act to the circumstances of the dominion, as may be enacted by such Legislature.

(2) If the Secretary of State certifies by notice published in the London Gazette that any self-governing dominion has passed legislation under which works, the authors whereof were at the date of the making of the works British subjects resident elsewhere than in the dominion or (not being British subjects) were resident in the parts of His Majesty's dominions to which this Act extends, enjoy within the dominion rights substantially identical with those conferred by this Act, then, whilst such legislation continues in force, the dominion shall, for the purposes of the rights conferred by this Act, be treated as if it were a dominion to which this Act extends; and

it shall be lawful for the Secretary of State to give such a certificate as aforesaid, notwithstanding that the remedies for enforcing the rights, or the restrictions on the importation of copies of works, manufactured in a foreign country, under the law of the dominion, differ from those under this Act.

Legislative powers of self-governing dominions.

26.—(1) The Legislature of any self-governing dominion may, at any time, repeal all or any of the enactments relating to copyright passed by Parliament (including this Act) so far as they are operative within that dominion: Provided that no such repeal shall prejudicially affect any legal rights existing at the time of the repeal, and that, on this Act or any part thereof being so repealed by the Legislature of a self-governing dominion, that dominion shall cease to be a dominion to which this Act extends.

(2) In any self-governing dominion to which this Act does not extend, the enactments repealed by this Act shall, so far as they are operative in that dominion, continue in force until repealed by the Legislature of that dominion.

(3) Where His Majesty in Council is satisfied that the law of a self-governing dominion to which this Act does not extend provides adequate protection within the dominion for the works (whether published or unpublished) of authors who at the time of the making of the work were British subjects resident elsewhere than in that dominion, His Majesty in Council may, for the

§ 26 (3). purpose of giving reciprocal protection, direct that this Act, except such parts (if any) thereof as may be specified in the Order, and subject to any conditions contained therein, shall, within the parts of His Majesty's dominions to which this Act extends, apply to works the authors whereof were, at the time of the making of the work, resident within the first-mentioned dominion, and to works first published in that dominion; but, save as provided by such an Order, works the authors whereof were resident in a dominion to which this Act does not extend shall not, whether they are British subjects or not, be entitled to any protection under this Act except such protection as is by this Act conferred on works first published within the parts of His Majesty's dominions to which this Act extends:

Provided that no such Order shall confer any rights within a self-governing dominion, but the Governor in Council of any self-governing dominion to which this Act extends, may, by Order, confer within that dominion the like rights as His Majesty in Council is, under the foregoing provisions of this subsection, authorised to confer within other parts of His Majesty's dominions.

For the purposes of this subsection, the expression "a dominion to which this Act extends" includes a dominion which is for the purposes of this Act to be treated as if it were a dominion to which this Act extends.

Power of Legislatures of British

27. The Legislature of any British possession to which this Act extends may modify or add to

§ 27.

any of the provisions of this Act in its application to the possession, but, except so far as such modifications and additions relate to procedure and remedies, they shall apply only to works the authors whereof were, at the time of the making of the work, resident in the possession, and to works first published in the possession.

possessions to pass supplemental legislation.

28. His Majesty may, by Order in Council, extend this Act to any territories under his protection and to Cyprus, and, on the making of any such Order, this Act shall subject to the provisions of the Order have effect as if the territories to which it applies or Cyprus were part of His Majesty's dominions to which this Act extends.

Application to protectorates.

Application of the Act to British possessions.

The application of the existing law to the British dominions is as follows (*a*):—The Act of 1842 relating to books extends throughout the British dominions, and the rights and remedies conferred by the Act are not affected by any Colonial legislation, except in so far as any British possession may have passed an Act or Ordinance relating to works first published in such possession. The Act of 1862 relating to artistic works, although it protects works produced anywhere in the British dominions, protects them only in the United Kingdom. Artistic works, as such, can only obtain protection in a British possession under a local Act or Ordinance. The Acts relating to engravings, and probably that relating to sculpture, are also confined in their operation to the United Kingdom. Paintings, drawings, photographs and engravings, which are published bound up in a book, are, however, protected under the Act of 1842 relating to books, and in this way copyright may be, and is very frequently, secured throughout the British dominions in all classes of artistic work which can be reproduced in the flat.

(*a*) *Ante*, p. 3.

§ 28. The application of the new Act to the British dominions will be as follows:—

The Act will be in force in—

(1) The United Kingdom;

(2) All British possessions other than self-governing dominions (subject to the right of a British possession to pass supplemental legislation relating to i procedure and remedies, ii works of authors resident in such possessions, iii works first published in such possession);

(3) Self-governing dominions (that is to say, Canada, Australia, New Zealand, South Africa and Newfoundland which shall, by their legislature, declare the Act to be in force within their territory subject to the right of supplemental legislation as above);

(4) Protectorates, including Cyprus, to which the Act may be extended by Order in Council.

The principal changes in the law will therefore be—

(1) The substitution in the case of artistic works of direct protection throughout the dominions in lieu of the present indirect protection under the Literary Copyright Act;

(2) The grant of complete legislative freedom to the self-governing dominions, with power to them to exclude authors resident in Great Britain from any rights in their territory, or to grant rights subject to manufacturing clauses or other conditions;

(3) The grant to other British possessions of larger powers of supplemental legislation.

The position of the self-governing dominions under the Act is as follows:—

A self-governing dominion may adopt one of three courses—

(i) It may adopt the Act, thereby renouncing for the time being its power of independent legislation;

(ii) It may acquire the full benefit of the Act throughout the rest of the British dominions if, by its own independent legislation, it

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grants to British subjects and residents in the British dominions generally, rights "identical with those conferred by the Act." Such rights may be deemed identical notwithstanding that they differ as regards (a) nature of remedies, (b) restrictions on importation.

This provision as regards importation will, subject to the approval of the Secretary of State, enable a self-governing dominion to get rid of, or modify, sect. 14, in other words, to admit foreign reprints of books first published in the United Kingdom either with or without some provision for collecting royalties for the benefit of the author. On the other hand, a self-governing dominion may, while taking the full benefit of the Act in the United Kingdom, prohibit the importation into the dominion of any book not printed in the dominion, thus preventing the author in the United Kingdom from reaping any benefit from his copyright in the dominion without going to the expense of reprinting his book there. These are the possibilities of the clause. Its main object, no doubt, is to enable a self-governing colony to introduce legislation similar to the Fisher Act in Canada, under which it is provided that, if in the case of books first published in the British dominions outside Canada, a licence to reproduce the work in Canada has been granted, copies printed outside Canada shall not be imported without the written consent of the licensee.

It will be observed that, in the case of the works of colonial authors and a licence being granted to a publisher in the United Kingdom, that publisher gets no protection against the importation of the colonial edition (*b*).

(iii) It may treat with the United Kingdom for reciprocal protection in the same way as if it

(*b*) *Ante*, p. 109.

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was a foreign country, and if adequate protection is granted in the dominion to the works of British subjects generally, an Order in Council may extend the benefit of the Act or any part thereof, and with or without conditions, to works first produced in the dominion.

It will be observed, however, that a self-governing dominion will be in a stronger position than a foreign country, in that sect. 23 is not applicable, and however harshly authors of the United Kingdom may be treated in a self-governing dominion, the Crown has no power, as in the case of a foreign country, to exclude works first produced in the dominion from acquiring copyright under the Act by simultaneous publication in the dominion, and within the limits of the Act.

PART II.

INTERNATIONAL COPYRIGHT.

§ 29. Power to extend Act to foreign works.

29.—(1) His Majesty may, by Order in Council, direct that this Act (except such parts, if any, thereof as may be specified in the Order) shall apply—

(a) to works first published (*a*) in a foreign country to which the Order relates, in like manner as if they were first published within the parts of His Majesty's dominions to which this Act extends (*b*);

(b) to literary, dramatic, musical, and artistic works, or any class thereof, the authors whereof were at the time of the making of the work subjects or citizens of a foreign country to which the Order relates, in like manner as if the authors were British subjects (*c*);

(c) in respect of residence (*d*) in a foreign country to which the Order relates, in like manner as if such residence were residence in the parts of His Majesty's dominions to which this Act extends;

(*a*) Sects. 1 (3), 35 (2), (3).
(*b*) Sect. 1 (1) (a).
(*c*) Sect. 1 (1) (b).
(*d*) Sects. 35 (4), 21, 19 (1).

§ 29 (1). and thereupon, subject to the provisions of this Part of this Act and of the Order, this Act shall apply accordingly:

Provided that—

(i) before making an Order in Council under this section in respect of any foreign country (other than a country with which His Majesty has entered into a convention relating to copyright), His Majesty shall be satisfied that that foreign country has made, or has undertaken to make, such provisions, if any, as it appears to His Majesty expedient to require for the protection of works entitled to copyright under the provisions of Part I. of this Act;

(ii) the Order in Council may provide that the term of copyright within such parts of His Majesty's dominions as aforesaid shall not exceed that conferred by the law of the country to which the Order relates;

(iii) the provisions of this Act as to the delivery of copies of books (*e*) shall not apply to works first published in such country, except so far as is provided by the Order;

(iv) the Order in Council may provide that the enjoyment of the rights conferred by this Act shall be subject to the

(*e*) Sect. 15.

accomplishment of such conditions and formalities (if any) as may be prescribed by the Order;

(v) in applying the provision of this Act as to ownership of copyright (*f*) the Order in Council may make such modifications as appear necessary having regard to the law of the foreign country:

(vi) in applying the provisions of this Act as to existing works (*g*) the Order in Council may make such modifications as appear necessary, and may provide that nothing in these provisions as so applied shall be construed as reviving any right of preventing the production or importation of any translation in any case where the right has ceased by virtue of section five of the International Copyright Act, 1886 (*h*). 49 & 50 Vict. c. 33.

(2) An Order in Council under this section may extend to all the several countries named or described therein.

30.—(1) An Order in Council under this Part of this Act shall apply to all His Majesty's dominions to which this Act extends (*i*) except self-governing dominions and any other possession specified in the Order with respect to which it

Application of Part II. to British possessions.

(*f*) Sect. 5.
(*g*) Sect. 24.
(*h*) 49 & 50 Vict. c. 33.
(*i*) Sects. 25 (1), 26 (1), 27, 28, 35 (1) ("Self-governing dominion").

§ 30 (1). appears to His Majesty expedient that the Order should not apply.

(2) The Governor in Council of any self-governing dominion to which this Act extends may, as respects that dominion, make the like Orders as under this Part of this Act His Majesty in Council is authorised to make with respect to His Majesty's dominions other than self-governing dominions, and the provisions of this Part of this Act shall, with the necessary modifications, apply accordingly.

(3) Where it appears to His Majesty expedient to except from the provisions of any Order any part of his dominions not being a self-governing dominion, it shall be lawful for His Majesty by the same or any other Order in Council to declare that such Order and this Part of this Act shall not, and the same shall not, apply to such part, except so far as is necessary for preventing any prejudice to any rights acquired previously to the date of such Order.

Summary of existing law relating to international copyright.

Under existing law the works of foreigners, if first produced in a foreign country (named in an Order in Council made under the International Copyright Act), are protected throughout the British dominions in the same manner as if they had been first produced in the United Kingdom, subject, however, to the following modifications:—

(a) No condition or formality (such as registration, name and date on engraving, notice of reservation on music) prescribed by the law of this country need be complied with;

(b) The work for which protection is claimed must be the subject-matter of copyright in the country of origin, and the copyright in that country must not have expired;

(c) The act complained of must be such that it would constitute an infringement in the country of origin;

(d) All conditions and formalities required by the law of the country of origin must have been complied with;

(e) In the case of books and dramatic pieces, if a complete authorised English translation has not been published in the United Kingdom within ten years from the date of first publication in the country of origin, the right of publishing or performing an English translation becomes free;

(f) English newspapers, provided they acknowledge the source, may, without permission, reprint from foreign newspapers (1) all articles of political discussion; (2) any other articles, unless the reproduction is prohibited by a conspicuous notice;

(g) Authors of non-treaty States may be excluded from the right to acquire copyright by first publication in a foreign country named in the Order; or the publishers of their works may be substituted for the author as the person in whose name proceedings must be taken.

Before making any Order under the International Copyright Acts, His Majesty must be satisfied that the foreign country or countries named in the Order will give adequate protection to British works in that country.

Effect of Order in Council under the Act.

Under the Act an Order of the King in Council will, subject to the provisoes in clause 29, operate to protect foreign works as if the foreign country named in the Order was a part of the British dominions to which the Act extends: the Order of the King in Council will not, however, protect foreign works in the self-governing dominions whether such dominions have or have not adopted the Act. Each self-governing dominion may decide for itself the question of international copyright in so far as the rights of foreign authors in that dominion are concerned.

Summary of alterations in law of international copyright.

The principal alterations in the law of international copyright will be—

(1) Complete freedom to the self-governing dominions

§§ 29, 30.

to grant or withhold protection as they think fit;

2) Protection will be granted to foreign works irrespective of the question whether, and to what extent, if any, such works are protected in the country of origin subject, however, to the power of the Crown to provide, with regard to any particular foreign country to which an Order relates, that the term of copyright in this country shall not exceed the term conferred by the law of the country of origin;

3) The performance of the conditions and formalities required by the law of the country of origin will not be a condition precedent to the enjoyment of the right here; but the Crown may, with regard to any particular foreign country, prescribe specific conditions or formalities to be observed as a condition precedent to protection.

4) Foreign works will enjoy an exclusive translating right for the full term of the copyright, and the printing of an authorised translation in this country, within ten years of first publication, will no longer be a condition precedent.

5) English newspapers will no longer be entitled to copy articles from foreign newspapers without express permission.

PART III.

SUPPLEMENTAL PROVISIONS.

31. No person shall be entitled to copyright or any similar right in any literary, dramatic, musical, or artistic work, whether published or unpublished, otherwise than under and in accordance with the provisions of this Act, or of any other statutory enactment for the time being in force, but nothing in this section shall be construed as abrogating any right or jurisdiction to restrain a breach of trust or confidence.

§ 31. Abrogation of common law rights.

As statutory copyright will subsist in all works, whether published or unpublished, there is no necessity for a concurrent common law right in unpublished works. The result, however, of the total abrogation of common law rights is to weaken to a certain extent the protection afforded to unpublished works —

Common law right superseded by statutory right.

(1) The statutory remedies being substituted for the common law remedies, the right to proceed against persons in possession of or dealing with infringements is considerably restricted.

(2) Although literary, dramatic, and musical works and engravings will be protected in perpetuity until publication, drawings, paintings and photographs, although unpublished, will not be protected after the expiration of life and fifty years, or in the case of photographs, fifty years from the making of the negative.

The concluding words were inserted on the report stage in the House of Lords so as to make it clear that the abrogation of common law rights only applies to the common law proprietary right. The right to proceed

§ 31. against persons who deal with a work in breach of contract, trust, or confidence, is left intact. This will enable proceedings to be brought, irrespective of copyright, to restrain the publication of private photographs, notes of private lectures, letters written between correspondents in confidential relationship to one another, manuscripts of books or plays lent for private use or submitted to a publisher or stage manager for perusal, and similar works not intended for publication. It will have to be shown, however, in each case, that the defendant was either himself guilty of the breach of contract, trust, or confidence alleged, or that he knowingly took advantage of some breach of contract, trust, or confidence on the part of another.

Provisions as to Order in Council.

32.—(1) His Majesty in Council may make Orders for altering, revoking, or varying any Order in Council made under this Act, or under any enactments repealed by this Act, but any Order made under this section shall not affect prejudicially any rights or interests acquired or accrued at the date when the Order comes into operation, and shall provide for the protection of such rights and interests.

(2) Every Order in Council made under this Act shall be published in the London Gazette and shall be laid before both Houses of Parliament as soon as may be after it is made, and shall have effect as if enacted in this Act.

Saving of university copyright. 15 Geo. 3. c. 53.

33. Nothing in this Act shall deprive any of the universities and colleges mentioned in the Copyright Act, 1775, of any copyright they already possess under that Act, but the remedies and penalties for infringement of any such copyright shall be under this Act and not under that Act.

§ 33.

Nature of University copyright.

The Copyright Act, 1775, was passed in order to protect the Universities of Oxford and Cambridge, the Scottish Universities, and the Colleges of Eton, Westminster and Winchester from the decision in *Donaldson* v. *Beckett* (*a*), which was to the effect that, since the passing of the Statute of Anne, there was no copyright in a published book after the expiration of the period of statutory copyright. The Act granted a perpetual copyright in any book which might be "bequeathed or otherwise given" to one of the above-named Universities or Colleges. As a condition precedent to the enjoyment of the right, the book for which the privilege is claimed must have been registered at Stationers' Hall within two months after the time when the bequest or gift of the copyright became known to the Vice-Chancellor of the University, or head of the College. The privilege is also conditional upon the book continuing to be printed only within the University or College, and for its sole benefit and advantage.

University copyright under the Act.

In so far as any perpetual copyright has already been acquired and subsists at the date of the Act coming into operation, it will continue as a perpetual right, subject to the same conditions as to printing within the university or college precincts as before. The special remedy in respect of infringement, which was given by the Act of 1775, that is to say, a right to recover one penny for every sheet found in the custody of the infringer, is taken away, and the ordinary remedies for infringement of copyright are substituted.

Inasmuch as the Act of 1775 will be repealed, no perpetual copyrights can be created after the new Act comes into force, and bequests or gifts to the universities or colleges will, in the future, carry no more than the period of copyright then belonging to the author or other assignor of the copyright.

Saving of compensation to certain libraries.

34. There shall continue to be charged on, and paid out of, the Consolidated Fund of the United Kingdom such annual compensation as was immediately before the commencement of this Act payable in pursuance of any Act as

(*a*) (1774), 2 Bro. P. C. 129; Cob. Parl. Hist. Vol. 17, p. 954.

§ 34. compensation to a library for the loss of the right to receive gratuitous copies of books:

Provided that this compensation shall not be paid to a library in any year, unless the Treasury are satisfied that the compensation for the previous year has been applied in the purchase of books for the use of and to be preserved in the library.

Under 54 Geo. III., there were in all eleven libraries which were entitled to a free copy of every published book. In 1836 an Act was passed which reduced the number to five, that is, those which at present enjoy the right, and as compensation to those which were deprived of the right, it was enacted that the Treasury might from time to time pay out of the Consolidated Fund an annual sum equal to the average annual value of the books received by each such library during the three years ending June 30, 1836. The bodies so entitled to compensation are Sion College, the four Universities of Scotland, and the King's Inns, Dublin. The object of this section is to preserve the right of these bodies to compensation.

Interpretation.

35.—(1) In this Act, unless the context otherwise requires,—

"Literary work" includes maps, charts, plans, tables, and compilations;

"Dramatic work" includes any piece for recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting form of which is fixed in writing or otherwise, and any cinematograph production where the arrangement or acting form or the combination of incidents represented give the work an original character;

"Artistic work" includes works of painting,

drawing, sculpture and artistic craftsmanship, and architectural works of art and engravings and photographs;

"Work of sculpture" includes casts and models;

"Architectural work of art" means any building or structure having an artistic character or design, in respect of such character or design, or any model for such building or structure, provided that the protection afforded by this Act shall be confined to the artistic character and design, and shall not extend to processes or methods of construction;

"Engravings" include etchings, lithographs, wood-cuts, prints, and other similar works, not being photographs;

"Photograph" includes photo-lithograph and any work produced by any process analogous to photography;

"Cinematograph" includes any work produced by any process analogous to cinematography;

"Collective work" means—

(a) an encyclopædia, dictionary, year book, or similar work;

(b) a newspaper, review, magazine, or similar periodical; and

(c) any work written in distinct parts by different authors, or in which works or parts of works of different authors are incorporated;

§ 35 (1).

"Infringing," when applied to a copy of a work in which copyright subsists, means any copy, including any colourable imitation, made, or imported in contravention of the provisions of this Act;

"Performance" means any acoustic representation of a work and any visual representation of any dramatic action in a work, including such a representation made by means of any mechanical instrument;

"Delivery," in relation to a lecture, includes delivery by means of any mechanical instrument;

"Plate" includes any stereotype or other plate, stone, block, mould, matrix, transfer, or negative used or intended to be used for printing or reproducing copies of any work, and any matrix or other appliance by which records, perforated rolls or other contrivances for the acoustic representation of the work are or are intended to be made;

"Lecture" includes address, speech, and sermon;

"Self-governing dominion" means the Dominion of Canada, the Commonwealth of Australia, the Dominion of New Zealand, the Union of South Africa, and Newfoundland.

(2) For the purposes of this Act (other than those relating to infringements of copyright), a work shall not be deemed to be published or

performed in public, and a lecture shall not be deemed to be delivered in public, if published, performed in public, or delivered in public, without the consent or acquiescence of the author, his executors administrators or assigns. § 35 (2).

There has been some difference of judicial opinion as to whether a work published without the consent of the author or his representatives ought or ought not to be deemed to be published (*a*). Sub-clause (2) of this clause is inserted to remove any such doubt, but it is probably in accordance with existing law.

(3) For the purposes of this Act, a work shall be deemed to be first published within the parts of His Majesty's dominions to which this Act extends, notwithstanding that it has been published simultaneously in some other place, unless the publication in such parts of His Majesty's dominions as aforesaid is colourable only and is not intended to satisfy the reasonable requirements of the public, and a work shall be deemed to be published simultaneously in two places if the time between the publication in one such place and the publication in the other place does not exceed fourteen days, or such longer period as may, for the time being, be fixed by Order in Council.

Simultaneous publication within and without the limits of the copyright statutes has always been deemed to be "first publication" within such limits. Under existing law, however, publication, in order to be simultaneous, must be on the same day as publication elsewhere. Subsect. (3) gives a margin of fourteen days after publication

(*a*) *Macmillan* v. *Dent*, [1907] 1 Ch. 107.

§ 35 (3). abroad within which copyright can be secured by publication within the limits of the Act. Under existing law a formal publication of a few copies at an excessive price is probably sufficient to secure copyright, and the provision that the publication shall be such as to satisfy the reasonable demands of the public will effect an alteration in the law.

(4) Where, in the case of an unpublished work, the making of a work has extended over a considerable period, the conditions of this Act conferring copyright shall be deemed to have been complied with, if the author was, during any substantial part of that period, a British subject or a resident within the parts of His Majesty's dominions to which this Act extends.

Sub-sect. (4) is consequential upon making the protection of unpublished works depend upon the nationality or place of residence of the author. It will remove a doubt which now exists under the similar provisions of the Fine Arts Copyright Act, 1862.

(5) For the purposes of the provisions of this Act as to residence, an author of a work shall be deemed to be a resident in the parts of His Majesty's dominions to which this Act extends if he is domiciled within any such part.

Sub-sect. (5) is not intended to be a definition of "resident," but it is so worded as to give that impression. The meaning of the paragraph would be clearer if it ran:—

"For the purposes of the provisions of this Act as to residence, an author of a work who is domiciled in any part of His Majesty's dominions to which this Act extends, shall be deemed to be a resident within such part."

Repeal. **36.** Subject to the provisions of this Act, the enactments mentioned in the Second Schedule to

this Act are hereby repealed to the extent specified in the third column of that schedule: § 36.

Provided that this repeal shall not take effect in any part of His Majesty's dominions until this Act comes into operation in that part.

37.—(1) This Act may be cited as the Copyright Act, 1911.

(2) This Act shall come into operation—

(a) in the United Kingdom, on the first day of July nineteen hundred and twelve or such earlier date as may be fixed by Order in Council;

(b) in a self-governing dominion to which this Act extends, at such date as may be fixed by the Legislature of that dominion;

(c) in the Channel Islands, at such date as may be fixed by the States of those islands respectively;

(d) in any other British possession to which this Act extends, on the proclamation thereof within the possession by the Governor.

SCHEDULES.

Section 24.

FIRST SCHEDULE.

EXISTING RIGHTS.

Existing Right.	Substituted Right.
(a) In the case of Works other than Dramatic and Musical Works.	
Copyright.	Copyright as defined by this Act.*
(b) In the case of Musical and Dramatic Works.	
Both copyright and performing right.	Copyright as defined by this Act.*
Copyright, but not performing right.	Copyright as defined by this Act, except the sole right to perform the work or any substantial part thereof in public.
Performing right, but not copyright.	The sole right to perform the work in public, but none of the other rights comprised in copyright as defined by this Act.

For the purposes of this Schedule the following expressions, where used in the first column thereof, have the following meanings:—

"Copyright," in the case of a work which according to the law in force immediately before the commencement of this Act has not been published before that date and statutory copyright wherein depends on publication, includes the right at common law (if any) to restrain publication or other dealing with the work;

"Performing right," in the case of a work which has not been performed in public before the commencement of this Act, includes the right at common law (if any) to restrain the performance thereof in public.

* In the case of an essay, article, or portion forming part of and first published in a review, magazine, or other periodical or work of a like nature, the right shall be subject to any right of publishing the essay, article, or portion in a separate form to which the author is entitled at the commencement of this Act, or would, if this Act had not been passed, have become entitled under section eighteen of the Copyright Act, 1842.

SECOND SCHEDULE.

Section 36.

EXACTMENTS REPEALED.

Session and Chapter.	Short Title and Extent of Repeal.
8 Geo. 2. c. 13 ..	The Engraving Copyright Act, 1734. The whole Act.
7 Geo. 3. c. 38 ..	The Engraving Copyright Act, 1767. The whole Act.
15 Geo. 3. c. 53 ..	The Copyright Act, 1775. The whole Act.
17 Geo. 3. c. 57 ..	The Prints Copyright Act, 1777. The whole Act.
54 Geo. 3. c. 56 ..	The Sculpture Copyright Act, 1814. The whole Act.
3 & 4 Will. 4. c. 15	The Dramatic Copyright Act, 1833. The whole Act.
5 & 6 Will. 4. c. 65	The Lectures Copyright Act, 1835. The whole Act.
6 & 7 Will. 4. c. 59	The Prints and Engravings Copyright (Ireland) Act, 1836. The whole Act.
6 & 7 Will. 4. c. 110	The Copyright Act, 1836. The whole Act.
5 & 6 Vict. c. 45..	The Copyright Act, 1842. The whole Act.
7 & 8 Vict. c. 12..	The International Copyright Act, 1844. The whole Act.
10 & 11 Vict. c. 95	The Colonial Copyright Act, 1847. The whole Act.
15 & 16 Vict. c. 12	The International Copyright Act, 1852. The whole Act.
25 & 26 Vict. c. 68	The Fine Arts Copyright Act, 1862. Sections one to six. In section eight the words "and pursuant to any Act for the protection of copyright engravings," and "and in any such Act as aforesaid." Sections nine to twelve.
38 & 39 Vict. c. 12	The International Copyright Act, 1875. The whole Act.
39 & 40 Vict. c. 36	The Customs Consolidation Act, 1876. Section forty-two, from "Books wherein" to "such copyright will expire." Sections forty-four, forty-five, and one hundred and fifty-two.
45 & 46 Vict. c. 40	The Copyright (Musical Compositions) Act, 1882. The whole Act.
49 & 50 Vict. c. 33	The International Copyright Act, 1886. The whole Act.
51 & 52 Vict. c. 17	The Copyright (Musical Compositions) Act, 1888. The whole Act.
52 & 53 Vict. c. 42	The Revenue Act, 1889. Section one, from "Books first published" to "as provided in that section."
6 Edw. 7. c. 36 ..	The Musical Copyright Act, 1906. In section three the words "and which has been registered in accordance with the provisions of the Copyright Act, 1842, or of the International Copyright Act, 1844, which registration may be effected notwithstanding anything in the International Copyright Act, 1886."

APPENDIX.

REVISED CONVENTION OF BERNE.

Signed at Berlin, November 13, 1908.

ARTICLE 1.

The Contracting States are constituted into an Union for the protection of the rights of authors over their literary and artistic works.

ARTICLE 2.

The expression "literary and artistic works" shall include any production in the literary, scientific or artistic domain, whatever may be the mode or form of its reproduction, such as books, pamphlets, and other writings; dramatic or dramatico-musical works, choreographic works and pantomimes, the acting form of which is fixed in writing or otherwise; musical compositions with or without words; works of design, painting, architecture, sculpture, engraving and lithography; illustrations, geographical charts; plans, sketches, and plastic works relative to geography, topography, architecture or science.

Translations, adaptations, arrangements of music and other reproductions in an altered form of a literary or artistic work as well as collections of different works, shall be protected as original works without prejudice to the rights of the author of the original work.

The contracting countries shall be bound to make provision for the protection of the above-mentioned works.

Works of art applied to industrial purposes shall be protected so far as the domestic legislation of each country allows.

ARTICLE 3.

The present Convention shall apply to photographic works and to works produced by a process analogous to photography. The contracting countries shall be bound to make provision for their protection.

ARTICLE 4.

Authors who are subjects or citizens of any of the countries of the Union shall enjoy in countries other than the country of origin of the work, for their works, whether unpublished or first published in a country of the Union, the rights which the respective laws do now or may hereafter grant to natives as well as the rights specially granted by the present Convention.

The enjoyment and the exercise of these rights shall not be subject to the performance of any formality; such enjoyment and such exercise are independent of the existence of protection in the country of origin of the work. Consequently, apart from the express stipulations of the present Convention, the extent of protection, as well as the means of redress secured to the author to safeguard his rights, shall be governed exclusively by the laws of the country where protection is claimed.

The country of origin of the work shall be considered to be: in the case of unpublished works, the country to which the author belongs; in the case of published works, the country of first publication; and in the case of works published simultaneously in several countries of the Union, the country the laws of which grant the shortest period of protection. In the case of works published simultaneously in a country outside the Union and in a country of the Union: the latter country shall be considered exclusively as the country of origin.

By published works must be understood, for the purposes of the present Convention, works copies of which are issued by a publisher. The representation of a dramatic or dramatico-musical work, the performance of a musical work,

the exhibition of a work of art, and the construction of a work of architecture shall not constitute a publication.

ARTICLE 5.

Authors being subjects or citizens of one of the countries of the Union who first publish their works in another country of the Union shall have in this latter country the same rights as native authors.

ARTICLE 6.

Authors not being subjects or citizens of one of the countries of the Union, who first publish their works in one of those countries, shall enjoy in that country the same rights as native authors, and in the other countries of the Union the rights granted by the present Convention.

ARTICLE 7.

The term of protection granted by the present Convention shall include the life of the author and fifty years after his death.

Nevertheless, in case such term of protection should not be uniformly adopted by all the countries of the Union, the term shall be regulated by the law of the country where protection is claimed, and must not exceed the term fixed in the country of origin of the work. Consequently the contracting countries shall only be bound to apply the provisions of the preceding paragraph in so far as such provisions are consistent with their domestic laws.

For photographic works and works produced by a process analogous to photography, for posthumous works, for anonymous or pseudonymous works, the term of protection shall be regulated by the law of the country where protection is claimed, provided that the said term shall not exceed the term fixed in the country of origin of the work.

ARTICLE 8.

The authors of unpublished works, being subjects or citizens of one of the countries of the Union, and the authors

of works first published in one of those countries shall enjoy, in the other countries of the Union, during the whole term of the right in the original work, the exclusive right of making or authorizing a translation of their works.

ARTICLE 9.

Serial stories, tales, and all other works, whether literary, scientific, or artistic, whatever their object, published in the newspapers or periodicals of one of the countries of the Union may not be reproduced in the other countries without the consent of the authors.

With the exception of serial stories and tales, any newspaper article may be reproduced by another newspaper unless the reproduction thereof is expressly forbidden. Nevertheless, the source must be indicated; the legal consequences of the breach of this obligation shall be determined by the laws of the country where protection is claimed.

The protection of the present Convention shall not apply to news of the day or to miscellaneous information which is simply of the nature of items of news.

ARTICLE 10.

As regards the liberty of extracting portions from literary or artistic works for use in publications destined for educational purposes, or having a scientific character, or for chrestomathies (*selections of choice passages from an author or authors*), the effect of the legislation of each country of the Union and of special Arrangements existing or to be concluded, between them is not affected by the present Convention.

ARTICLE 11.

The stipulations of the present Convention shall apply to the public representation of dramatic or dramatico-musical works and to the public performance of musical works, whether such works be published or not.

Authors of dramatic or dramatico-musical works shall be protected during the existence of their right over the original

work against the unauthorized public representation of translations of their works.

In order to enjoy the protection of the present Article, authors shall not be bound in publishing their works to forbid the public representation or performance thereof.

ARTICLE 12.

The following shall be specially included among the unlawful reproductions to which the present Convention applies: Unauthorized indirect appropriations of a literary or artistic work, such as adaptations, musical arrangements, transformations of a novel, tale, or piece of poetry into a dramatic piece and *vice versâ*, &c., when they are only the reproduction of that work, in the same form or in another form, without essential alterations, additions, or abridgments, and do not present the character of a new original work.

ARTICLE 13.

The authors of musical works shall have the exclusive right of authorizing (1) the adaptation of those works to instruments which can reproduce them mechanically; (2) the public performance of the said works by means of these instruments.

Reservations and conditions relating to the application of this Article may be determined by the domestic legislation of each country in so far as it is concerned; but the effect of any such reservations and conditions will be strictly limited to the country which has put them in force.

The provisions of paragraph 1 shall not be retroactive, and consequently shall not be applicable in any country of the Union to works which have been lawfully adapted in that country to mechanical instruments before the coming into force of the present Convention.

Adaptations made in virtue of paragraphs 2 and 3 of the present Article, and imported without the authority of the interested parties into a country where they would not be lawful, shall be liable to seizure in that country.

ARTICLE 14.

Authors of literary, scientific or artistic works shall have the exclusive right of authorizing the reproduction and public representation of their works by cinematography.

Cinematograph productions shall be protected as literary or artistic works if, by the arrangement of the acting form or the combinations of the incidents represented, the author has given the work a personal and original character.

Without prejudice to the rights of the author of the original work the reproduction by cinematography of a literary, scientific or artistic work shall be protected as an original work.

The above provisions apply to reproduction or production effected by any other process analogous to cinematography.

ARTICLE 15.

In order that the authors of works protected by the present Convention shall, in the absence of proof to the contrary, be considered as such, and be consequently admitted to institute proceedings against pirates before the Courts of the various countries of the Union, it will be sufficient that their name be indicated on the work in the accustomed manner.

For anonymous or pseudonymous works the publisher, whose name is indicated on the work, shall be entitled to protect the rights belonging to the author. He shall be, without other proof, deemed to be the legal representative of the anonymous or pseudonymous author.

ARTICLE 16.

Pirated works may be seized by the competent authorities of any country of the Union where the original work enjoys legal protection.

In such a country the seizure may also apply to reproductions imported from a country where the work is not protected, or has ceased to be protected.

The seizure shall take place in accordance with the domestic legislation of each country.

ARTICLE 17.

The provisions of the present Convention cannot in any way derogate from the right belonging to the Government of each country of the Union to permit, to control, or to prohibit, by measures of domestic legislation or police, the circulation, representation, or exhibition of any works or productions in regard to which the competent authority may find it necessary to exercise that right.

ARTICLE 18.

The present Convention shall apply to all works which at the moment of its coming into force have not yet fallen into the public domain in the country of origin through the expiration of the term of protection.

If, however, through the expiration of the term of protection which was previously granted, a work has fallen into the public domain of the country where protection is claimed, that work shall not be protected anew in that country.

The application of this principle shall take effect according to the stipulations contained in special Conventions existing, or to be concluded, to that effect between countries of the Union. In the absence of such stipulations, the respective countries shall regulate, each in so far as it is concerned, the manner in which the said principle is to be applied.

The above provisions shall apply equally in case of new accessions to the Union, and also in the event of the term of protection being extended by the application of Article 7.

ARTICLE 19.

The provisions of the present Convention shall not prevent a claim being made for the application of any wider provisions which may be made by the legislation of a country of the Union in favour of foreigners in general.

ARTICLE 20.

The Governments of the countries of the Union reserve to themselves the right to enter into special arrangements

between each other, provided always that such arrangements confer upon authors more extended rights than those granted by the Union, or embody other stipulations not contrary to the present Convention. The provisions of existing arrangements which answer to the above-mentioned conditions shall remain applicable.

ARTICLE 21.

The International Office established under the name of the "Office of the International Union for the Protection of Literary and Artistic Works" shall be maintained.

That office is placed under the high authority of the Government of the Swiss Confederation, which regulates its organization and supervises its working.

The official language of the Office shall be French.

ARTICLE 22.

The International Office collects every kind of information relative to the protection of the rights of authors over their literary and artistic works. It arranges and publishes such information. It undertakes the study of questions of general interest concerning the Union, and by the aid of documents placed at its disposal by the different Administrations, edits a periodical publication in the French language on the questions which concern the objects of the Union. The Governments of the countries of the Union reserve to themselves the power to authorize by common accord the publication by the Office of an edition in one or more other languages, if experience should show this to be requisite.

The International Office will always hold itself at the disposal of members of the Union with the view to furnish them with any special information which they may require relative to the protection of literary and artistic works.

The Director of the International Office shall make an annual report on his administration, which shall be communicated to all the members of the Union.

ARTICLE 23.

The expenses of the Office of the International Union shall be shared by the contracting countries. Until a fresh decision is arrived at, they cannot exceed the sum of 60,000 fr. a year. This sum may be increased, if necessary, by the simple decision of one of the Conferences provided for in Article 24.

The share of the total expense to be paid by each country shall be determined by the division of the contracting and acceding countries into six classes, each of which shall contribute in the proportion of a certain number of units, viz.:—

1st class	.....	25 units.
2nd „	.....	20 „
3rd „	.....	15 „
4th „	.....	10 „
5th „	.....	5 „
6th „	.....	3 „

These coefficients are multiplied by the number of countries of each class, and the total product thus obtained gives the number of units by which the total expense is to be divided. The quotient gives the amount of the unit of expense.

Each country shall declare, at the time of its accession, in which of the said classes it desires to be placed.

The Swiss Administration prepares the Budget of the Office, superintends its expenditure, makes the necessary advances, and draws up the annual account which will be communicated to all the other Administrations.

ARTICLE 24.

The present Convention may be submitted to revisions in order to introduce therein amendments calculated to perfect the system of the Union.

Questions of this kind, as well as those which are of interest to the Union in other respects, shall be considered in Conferences to be held successively in the countries of the Union by delegates of the said countries. The Adminis-

tration of the country where a Conference is to meet prepares, with the assistance of the International Office, the work of the Conference. The Director of the Office shall attend at the sittings of the Conferences, and shall take part in the discussions without the right to vote.

No alteration in the present Convention shall be binding on the Union except by the unanimous consent of the countries composing it.

ARTICLE 25.

States outside the Union which make provision for the legal protection of rights forming the object of the present Convention may accede thereto on request to that effect.

Such accession shall be notified in writing to the Government of the Swiss Confederation, who will communicate it to all the other countries of the Union.

Such accession shall imply full adhesion to all the clauses and admission to all the advantages provided by the present Convention. It may, nevertheless, contain an indication of the provisions of the Convention of the 9th September, 1886, or of the Additional Act of the 4th May, 1896, which they may judge necessary to substitute, provisionally at least, for the corresponding provisions of the present Convention.

ARTICLE 26.

Contracting countries shall have the right to accede to the present Convention at any time for their Colonies or foreign possessions.

They may do this either by a general Declaration comprising in the accession all their Colonies or possessions, or by specially naming those comprised therein, or by simply indicating those which are excluded.

Such Declaration shall be notified in writing to the Government of the Swiss Confederation, who will communicate it to all the other countries of the Union.

ARTICLE 27.

The present Convention shall replace, in regard to the relations between the Contracting States, the Convention

of Berne of the 9th September, 1886, including the Additional Article and the Final Protocol of the same date, as well as the Additional Act and the Interpretative Declaration of the 4th May, 1896. These instruments shall remain in force in regard to relations with States which do not ratify the present Convention.

The Signatory States of the present Convention may declare at the exchange of ratifications that they desire to remain bound, as regards any specific point, by the provisions of the Conventions which they have previously signed.

ARTICLE 28.

The present Convention shall be ratified, and the ratifications exchanged at Berlin not later than the 1st July, 1910.

Each Contracting Party shall, as regards the exchange of ratifications, deliver a single instrument, which shall be deposited with those of the other countries in the archives of the Government of the Swiss Confederation. Each Party shall receive in return a copy of the *procès-verbal* of the exchange of ratifications signed by the Plenipotentiaries who took part.

ARTICLE 29.

The present Convention shall be put in force three months after the exchange of ratifications, and shall remain in force for an indefinite period until the termination of a year from the day on which it may have been denounced.

Such denunciation shall be made to the Government of the Swiss Confederation. It shall only take effect in regard to the country which made it, the Convention remaining in full force and effect for the other countries of the Union.

ARTICLE 30.

The States which shall introduce in their legislation the duration of protection for fifty years contemplated by Article 7, first paragraph, of the present Convention, shall give notice thereof in writing to the Government of the Swiss Confederation, who will communicate it at once to all the other States of the Union.

The same procedure shall be followed in the case of the States renouncing the reservations made by them in virtue of Articles 25, 26, and 27.

In faith whereof the respective Plenipotentiaries have signed the present Convention, and have affixed thereto their seals.

Done at Berlin, the 13th day of November, 1908, in a single copy, which shall be deposited in the archives of the Government of the Swiss Confederation, and of which duly certified copies shall be transmitted by the diplomatic channel to the contracting countries.

For Germany:

(L.S.) Dr. K. Von Studt.
(L.S.) Von Koerner.
(L.S.) Dungs.
(L.S.) Goebel Von Harrant.
(L.S.) Robolski.
(L.S.) Josef Kohler.
(L.S.) Osterrieth.

For Belgium:

(L.S.) Count Della Faille de Leverghem.
(L.S.) Jules de Borchgrave.
(L.S.) Wauwermans.

For Denmark:

(L.S.) J. Hegermann Lindencrone.

For Spain:

(L.S.) Luis Polo de Bernabé.
(L.S.) Eugenio Ferraz.

For France:

(L.S.) Jules Cambon.
(L.S.) E. Lavisse.
(L.S.) Paul Hervieu.
(L.S.) L. Renault.
(L.S.) Gavarry.
(L.S.) G. Breton.
(L.S.) Georges Lecomte.

For Great Britain:

(L.S.) H. G. BERGNE.
(L.S.) GEORGE R. ASKWITH.
(L.S.) J. DE SALIS.

For Italy:

(L.S.) PANSA.
(L.S.) LUIGI ROUX.
(L.S.) SAMUELE OTTOLENGHI.
(L.S.) EMILIO VENEZIAN.
(L.S.) AVV. AUGUSTO FERRARI.

For Japan:

(L.S.) MIZUNO RENTARO.
(L.S.) HORIGUCHI KUMAICHI.

For the Liberian Republic:

(L.S.) VON KOERNER.

For Luxembourg:

(L.S.) Count DE VILLERS.

For Monaco:

(L.S.) Baron DE ROLLAND.

For Norway:

(L.S.) KLAUS HOEL.

For Sweden:

(L.S.) TAUBE.
(L.S.) P. M. AF UGGLAS.

For Switzerland:

(L.S.) ALFRED VON CLAPARÈDE.
(L.S.) W. KRAFT.

For Tunis:

(L.S.) JEAN GOUT.

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LONDON: PRINTED BY C. F. ROWORTH, 88, FETTER LANE, E.C.